TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 215

JOHN C. SCHUMACHER, SHERIFF OF BUTLER COUNTY, OHIO, PETITIONER,

vs.

RALPH K. BEELER, TRUSTEE IN BANKRUPTCY OF THE LONG & ALLSTATTER COMPANY, BANKRUPT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 31, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934.

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INDEX.

	Original	Print
Record from D. C. U. S., Southern Ohio	1	1
Application for restraining order	1	1
Exhibit 1—List of machinery and equipment attached to building or permanently installed	3	4
Subpœna in equity and marshal's returns	16	17
Notice of application for restraining order	17	18
Temporary restraining order	18	19
Motion to disolsve restraining order and dismiss	19	19
Exhibit A—Inventory	22	22
Answer	33	34
Motion for leave to withdraw answer	35	36
Order setting aside temporary restraining order	35	36
Order restraining sale of property for ten days	36	37
Motion to dissolve temporary restraining order and to dismiss cause	37	37
Order granting jurat on bill of complaint	39	40
Order dissolving temporary restraining order and dismissing cause	39	40

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 25, 1934.

—5566-C.

	Original	Print
Petition for appeal	40	41
Assignment of errors	41	41
Order allowing appeal	43	43
Bond on appeal (omitted in printing)	43	
Citation and service (omitted in printing)	45	
Order extending time to file record	45	44
Præcipe for transcript of record	46	44
Præcipe for addition to transcript	47	45
Præcipe for additions to transcript	48	45
Certificate of clerk (omitted in printing)	48	
Proceedings in U. S. C. C. A., Sixth Circuit	51	46
Motion to correct error in record	51	46
Petition (copy) (omitted in printing)	52	
Minute entry of argument and submission	55	47
Judgment	56	47
Opinion, Simons, J.	56	47
Clerk's certificate (omitted in printing)	62	
Order allowing certiorari	63	52

[fols. a & 1]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

Eq. 866

RALPH K. BEELER, Trustee in Bankruptcy of The Long & Allstatter Company, Bankrupt, Plaintiff,

v.

JOHN C. SCHUMACHER, Sheriff of Butler County, Ohio, Defendant

APPLICATION FOR RESTRAINING ORDER—Filed August 26, 1933

To the Honorable the Judges of The District Court of the United States, in and for the Southern District of Ohio, Western Division:

Your complainant, Ralph K. Beeler, represents to the Court that he is the duly appointed, qualified and acting Trustee in Bankruptcy of The Long & Allstatter Company, of Hamilton, Ohio, Bankrupt.

Your petitioner further represents that by the consideration of the Honorable William Jerome Kuertz, Referee in Bankruptcy for the Southern District of Ohio, Western Division, in a proceeding pending before said Referee arising in said bankruptcy cause, on the 21st day of August, 1933, an order was entered whereby said Referee overruled a motion filed in said bankruptcy proceedings by one A. Hunter Willis, calling upon the Trustee to disclaim all right, title and interest in, or right of possession or control of, the real and personal property of the above bankrupt listed in the inventory and appraisement theretofore made and returned in this cause, and further ruled that so much of the personal property of the bankrupt which had been levied upon by John C. Schumacher, Sheriff of Butler County, on a judgment obtained by said A. Hunter Willis in cause No. A-30454 on the docket of the Court of Common Pleas of Hamilton County, Ohio, and on which said judgment execution issued from said Court of Common Pleas of Hamilton County to said Sheriff of Butler County, [fol. 2] as is not fixtures and not part and parcel of the

real estate of said bankrupt is subject to said levy and the jurisdiction of said Court of Common Pleas of Hamilton County, but that as to so much of said property as is real estate, or part and parcel of the real estate of said bankrupt and appurtenant or affixed thereto, said Referee ruled were within the sole jurisdiction and control of the Bankruptcy Court; that thereby said real estate under the bankruptcy laws was and is in the custody and control of the Trustee herein and that the sale thereof cannot lawfully be made except by order of the Bankruptcy Court, and that there is pending in said bankruptcy proceeding a petition by the Trustee to sell said real estate.

Your Trustee further represents that said controversy on said motion of said A. Hunter Willis arises by reason of the recovery by said A. Hunter Willis by the consideration of the Court of Common Pleas of Hamilton County, Ohio, of a judgment in the amount of One Hundred and Seven Thousand Plus Dollars against the bankrupt herein on June 10, 1932; that said judgment has been affirmed by the Court of Appeals for the First Appellate District of Ohio, and a motion to certify the record to the Supreme Court of Ohio denied; that pursuant to the order of execution aforesaid, but contrary to the statutes of the State of Ohio in such case made and provided, said Sheriff in addition to goods and chattels of The Long & Allstatter Company levied upon certain property affixed, appurtenant to and part of its operating plant in the City of Hamilton, Butler County, which in law are fixtures, and pursuant to said order of execution has advertised and threatens, unless restrained by this Court, on August 28, 1933, will sell at public auction all of the property of The Long & Allstatter Company, which appears set forth in the exhibit hereto attached, marked 1, and made part hereof. Said exhibit contains a list of the properties of said bankrupt claimed by this Trustee to be fixtures and appurtenant to and part of the realty thereof, and a part of its manufacturing plant.

Your Trustee further represents that under the law of Ohio, to-wit: General Code, Section 11664, the sheriff shall first exhaust goods and chattels of the judgment debtor before he may levy upon lands and tenements to satisfy a judgment; that contrary to the provisions of said section of the General Code of Ohio said Sheriff attempted to levy

upon fixtures, as hereinbefore set forth, and includes the same with goods and chattels of the bankrupt which he is about to sell as aforesaid.

[fol. 3] Your Trustee further represents that pending the determination by the Referee in Bankruptcy of the question of whether or not the property of bankrupt set forth in Exhibit 1 hereto attached be fixtures, if said Sheriff be permitted to sell the same, as he threatens to do, your Trustee will be irreparably injured and damaged and the orderly administration of the bankrupt's estate herein hindered and impeded, for which there is no adequate remedy at law.

Wherefore, the Trustee prays for an order directed to John C. Schumacher, as Sheriff of Butler County, Ohio, temporarily restraining and enjoining said Sheriff from proceeding with, causing or permitting the sale of any property of the bankrupt as set forth in Exhibit 1 hereto attached, on August 28, 1933, or any other day, until it be determined either in this proceeding, or in a proceeding before said Referee, as to whether or not said property be fixtures and a part of the manufacturing plant of said bankrupt, and therefore assets of the bankrupt estate, and upon final hearing that said injunction may be made permanent, and he prays for such other and further relief herein to which he may be entitled.

Brandon R. Millikin, Attorney for Ralph K. Beeler, Trustee.

STATE OF OHIO,
Butler County, ss:

Personally appeared before me, the undersigned, a Notary Public in and for said county and state, Ralph K. Beeler, the duly elected, qualified and acting Trustee in Bankruptcy herein, who on oath declared the allegations of the foregoing application to be true, as he verily believes.

Ralph K. Beeler.

Signed in my presence and sworn to before me this 25th day of August, 1933. Frederick A. Reister, Notary Public, Butler County, Ohio. My commission expires June 2, 1934. (Seal.)

Exhibit 1 to Application

Machinery and Equipment Bolted or Permanently Attached to the Building or Permanently Installed

In Production Office

1 Time Clock, attached and fitted.
1 Alarm System, attached and fitted.

In Lobby

Hose & Reel, attached.
1 International Time Recorder Clock & Rack, attached to wall.

In Drawing Room

1 24-drawer Wood Filing Cabinet (attached).
1 Filing Cabinet, built in.
1 24-drawer Wood Blue Print Filing Cabinet (nailed).
[fol. 4]
1 36-drawer Wood Filing Cabinet (nailed to floor).
2 11-drawer Wood Filing Cabinets (nailed to floor).
1 Long Wood Table, built in.

In Pattern Room

1 Saw, Motor Drive, bolted.
1 Planer (attached) with motor, bolted to floor.
1 20" Joiner (attached) with motor, bolted to floor.
1 36" Band Saw (attached) with motor, bolted to floor.
1 Sander (attached) with motor, bolted.
1 Small Sander, bolted (No value).
1 Large Numbering Machine (attached to bench attached to floor).
2 Small Numbering Machines (attached to bench attached to floor).
Built-in Drawers and Bench (attached).
1 27x Wet Tool Grinder, motor attached (bolted).
1 28x Pattern Maker Lathe, motor attached (bolted).

In Machine Shop, No. 1

1 18' Hand Traveling Crane with 3 T. Ch. Block, Attached to building.
1 14 Drawer Wood Work Bench (attached to floor) No value.

3 Fitting Trestles for couplings, fastened to floor. No value.
1 32″ Columbia Shaper (27P) M. D. Bolted.
1 28″ Columbia Shaper (28P) M. D. Bolted.
1 20″ Columbia Shaper (26P) M. D. Bolted.
1 Garvin Die Slotter, Belt Drive, bolted.
1 Electric Motor, bolted (9 E).
1 Traveling Crane with Block (H-2) att. to bldg.
1 Keyseater (4-S) B. D. Bolted.
Countershaft for slotter, bolted to wall.
1 Bullard Boring Machine (6B) 24″, motor att. Bolted Down.
1 36″ Bullard Boring Mill (8B) motor att. Bolted down.
1 5′ Niles Boring Mill (5B) Belt drive through motor att. to bldg. Bolted Down.
18′ Span Traveling Crane Block, att. to bldg.
1 Clock, att. to wall (No value).
[fol. 5]
1 Westinghouse Control System in Electric Room, att. to floor, Generators and switchboard, entire contents.
1 Traveling Crane Trolley & Block (hand) 1½ T. att. to bldg.
1 10″ P. & W. Slotter (5S) Belt, bolted down.
1 24″ Sellers Slotter (1S) Belt, bolted down.
1 20″ Niles Slotter (2S) Belt, bolted down.
1 #4 Cin. Miller (12M) Motor Drive, bolted.
1 #5 Cin. Miller (13M) Motor Drive, bolted.
1 36″ Garvin Cam Miller (7M) Knuckle Shaft Drive, bolted down.
1 32″ x 32″ x 8′ Gray Planer (10P) Belt, bolted.
1 30″ x 30″ x 8′ Gray Planer (9P) Belt, bolted.
1 Motor and Starter attached to bldg. (15 H. P.)
1 Motor and Starter attached to bldg.
1 Motor and Starter attached to bldg.
1 Double End Tool Grinder (17G) Belt, bolted.
1 36″ Hamilton Planer (8P) Belt, (bolted) and motor.
1 Motor and Starter for Hamilton Planer (7P), bolted down.
1 Hamilton 42″ x 42″ x 14′ Planer, (7P) Belt, bolted.
1 Starter and Control for Planer 6P. att. to bldg.
1 60″ Gray Planer (6P) Motor Attached, bolted.
1 44″ Niles Planer (5P) Motor Attached, bolted.
1 42″ Pond Planer (25P) Motor Attached, bolted.

1 4-Head Ingersoll Miller (11M) Motor att. and cutters bolted.
1 5′ Niles Boring Mill (4B) Belt, bolted.
1 Motor and Starter for Boring Mill (4B) att. to bldg.
Jib Crane and Block att. to bldg. (Chain Hoist).
1 6′ Gisholt Bor. Mill (9B) Motor att. Bolted.
1 10′ Niles Boring Mill (3B) Belt, bolted.
1 Mortor & Starter for Bor. Mill 3B, bolted down.
1 Circular Saw Sharpener, screwed down.
1 Motor, bolted (No Value).
1 Circular Saw Sharpener. Bolted.
1 Table Wood Saw, Motor Drive, bolted.
1 Wet Side Grinder, bolted.
Motor &Starter for Grinder, att. to bldg.
1 Gate Shear, (32X) bolted, belt drive.
Motor & Starter for Grinder, att. to bldg.
1 77″ x 24″ Gear Shaper (102P) Motor att. Bolted.
[fol. 6]
1 144″ x 36″ Gear Shaper (100P) Motor att. Bolted.
1 36″ Niles Lathe (25T) Motor att. bolted.
1 42″ x 30″ H. S. G. Lathe (1T) Motor attached. Bolted.
1 5′ Niles Radial Drill (1D) Motor att., bolted.
1 6′ Niles Radial Drill (17D) Motor att., bolted.
1 6′ Niles Radial Drill (18D) Motor att., bolted.
1 Jib Crane with Block, att. to bldg.
1 Horiz. Boring Machine (2B) Belt, bolted.
1 Motor and Starter, att. to bldg.
Line Shaft for Miller & 2 Drill Presses, att. to bldg.
1 40″ Back Geared Drill Press (5D) Belt, bolted.
1 42″ Back Geared Drill Press (6D) Belt, bolted.
1 Jib Crane & Block, att. to bldg.
1 Jib Crane & Block, att. to bldg.
1 25 T. Power Crane, att. to bldg.

In Machine Shop No. 2

1 Trolley Elec. Chain Block for Furnace, att.
1 Gleason Gear Shaper (3M) Belt, bolted.
1 Brainard Miller (1M) Belt, bolted.
1 B. & S. Miller (2M) Belt, bolted.
1 Bradford Engine Lathe (5T) Belt, bolted.
1 Monarch Lathe (26T) Motor att., bolted.
1 LeBlond Lathe (27T) Motor att., bolted.
1 18′ Hand Traveling Crane & Block, att. to bldg.

1 Arbor Press No. 5-106A, bolted.
1 Niles Lathe (3T) Belt, bolted.
1 G. E. Motor, 20 H. P. & Starter (9E) att. to bldg.
1 Lathe (4T) Belt, bolted, C/S att. to bldg.
1 Hamilton Lathe (11T) Belt, bolted, C/S att. to bldg.
1 Warner-Swazey Turret Lathe (28T) Motor att., bolted.
1 P. & W. Turret Lathe (19T) Belt, bolted C/S att. to bldg.
1 P. & W. Turret Lathe (18T) Belt, bolted, C/S att. to bldg.
1 Lodge Davis Lathe (8T), bolted, Belt, C/S att. to bldg.
1 S. B. & E. Lathe (6T) Belt, bloted, C/S att. to bldg.
1 Bradford Lathe (9T) Belt, bolted, C/S att. to bldg.
[fol. 7]
1 Bradford Lathe (7T) Belt, bolted, C/S att. to bldg.
1 Bradford Lathe (12T) Belt, bolted, C/S att. to bldg.
1 20 H. P. West. Motor & Starter, att. to bldg.
3 Line Shafts att. to bldg.
1 Circular Metal Cold Saw (1C) Belt, bolted.
1 18′ Hand Traveling Crane Block. att. to bldg.
1 Peerless Draw Cut Saw, Belt, bolted.
1 Chain Block & Runway (built in) Att. to bldg.
1 Tempering Furnace on floor, piped.
1 Gas furnace on floor, piped.
1 Blower & Motor, bolted.
1 Smith's Forge (38X), bolted on concrete.
1 Smith's Forge on Concrete Foundation.
1 Jib Crane, att. to bldg.
1 Nazel Air Hammer, motor att., bolted.
1 Niles Horiz. Floor Borer, Motor att., bolted.
1 Oil Extractor (17X) Belt, bolted.
1 Motor & Line Shaft (36E), att. to bldg. R. E.
1 Ingersoll Miller (4M) Belt, bolted. C/S att. to bldg.
1 Motor and Starter (37E) att.
1 Wet Tool Grinder (9G) Belt, bolted.
1 Wet Tool Grinder (5G) Belt, bolted, C/S att. to bldg.
1 Machine Bolt Cutter (18X) Belt, bolted, C/S att. to bldg.
1 Centering Machine (108A) Belt, bolted, C/S att. to bldg.
1 Arbor Press (107A) No. 3½, bolted.
1 Milling Cutter Grinder (15G) Motor attached, bolted.
1 Worthington Air Compressor with motor and tank, bolted.
1 Cupboard full of misc. tools, att. to bldg.

1 Rockford 2½ Miller (6M) Belt, bolted. C/S att. to bldg.
1 Flather & Co. Lathe (21T) Belt, bolted. C/S att. to bldg.
1 Drill Grinder (7G) Belt, bolted. C/S att. to bldg.
1 Kester 15 H. P. Motor & Starter, att. to bldg.
1 B. & S. Miller (5M) Belt, bolted. C/S att. to bldg.
1 Norton Tool Grinder (1G) Belt, bolted. C/S att. to bldg.

[fol. 8]

1 Old Punch Press (29X) Belt, bolted.
1 Fosdick Radial Drill (14D) Belt, bolted. C/S att. to bldg.
1 Upright Drill Press, Hamilton, (9D) Belt, bolted. C/S att. to bldg.
1 Upright G. & E. Drill (8D) Belt, bolted. C/S att. to bldg.
1 Friction Driven Drill Press (11D) Belt, bolted.
1 Cin. Upright Drill Press (12D) Belt, bolted.
1 Wall Clock, att. to bldg.
1 Gas Metal Heating Furnace attached.
1 25 T. Traveling Crane, att. to bldg.
1 25 T. Traveling Crane, att. to bldg.
1 Dries 8′ Radial Drill (15D) Motor att., bolted on concrete.
1 Liberty Openside Planer (11P) with motor & starter att., bolted.
1 Gray Planer (3P) Motor att., bolted. (48 in. x 72 in.)
1 Gray Planer (2P) Motor att., bolted.
1 Niles Horiz. Boring Mill (1B) Motor att., bolted down.
1 Jib Crane Chain Block, att. to bldg.
1 Openside Ingersoll Miller (8M) Motor att., bolted down.
1 Jib Crane & Chain Block, att. to bldg.
1 Work Bench & Vise, Att.
1 Openside D. & H. Planer (1P) Motor att., bolted down.
1 Motor & Starter 10 H. P. 440 V. A. C. att. to bldg.
1 Double Emery Wheel Stand, bolted down.
1 Dries 8′ Radial Drill (16D) Motors attached, bolted down.
3 Wood Work Benches and 8 vises attached, bolted to floor.

In Foundry

1 Toledo Floor Scale, built in.
2 30 T. Whiting Traveling Cranes, att. to bldg.

2 5 T. Northern Traveling Cranes, att. to bldg.
1 No. 5 Whiting Cupola, Bolted down (54")
1 No. 5 Whiting Cupola, Built in.
1 Time Recording Clock, attached to office wall.
1 Circular Saw Table, Bolted down, with motor attached.
1 Wood Bench and vise, attached.
1 Wood Bench and vise, attached.
[fol. 9]
1 Sand Slinger (Beardsley Piper Co.).
1 Sand Mixer, Bolted down to foundation.
1 Sand Crusher, Bolted Down.
2 10 T. Northern Traveling Cranes, att. to bldg.
1 Tumbling Mill fastened to floor, Bolted.
1 Tumbling Mill, fastened to floor, Bolted.
1 Double Grinder, fastened to floor, Bolted.
1 Suction Blower, built in, and accumulator. Att. to bldg.
1 Laidlaw Air Compressor complete, motor and storage tank, built in, bolted down.
1 Root Blower & Motor attached, bolted down.
1 Garden City Blower Fan, bolted down, and 1 motor knocked down.
1 G. E. Centrifugal Blower, motor attached, bolted down.

NOTE: The term "bolted" as used, means bolted to door. The term "C/S att. to bldg.", as used, means countershaft attached to building.

The term "belt" used in connection with the machines means belt drive."

Equipment Used in Manufacturing Plant

Power Plant and all attached wiring, motors and control equipment.
Heating Plant.
All Patterns, including Oldroyd patterns.
All Drawings.
All Jigs and Dies, including those for Oldroyd machines.

In Blue Print Room

1 Blue Print Dryer.
1 Photostat Machine & Box.
1 10-drawer Wood Filing Cabinet.
1 Blue Print Washer.
1 Blue Print Machine (Buckeye Engine Co.)

In Drawing Room

9 Drawing Boards.
1 3-Drawer Photo File Cabinet.
1 3-Drawer *P*lue Print File Cabinet.
1 Art Metal 3-drawer Blue Print Cabinet.
1 4-drawer Steel Filing Cabinet.
1 3-drawer Steel Filing Cabinet.
1 8-door Wood Filing Cabinet.

[fol. 10] In Pattern Room

1 Wood Work Bench.
1 Wood Desk, 5 drawer.
10 Wood pattern Making Benches with vises.
1 Wood Trimmer.
1 Wood Pattern Making Bench without vise.
2 Electric Glue Pots.
1 Hand Truck.
1 Lot (18) Wood Clamps.
1 Wood Table.
1 Wood Trimmer.
1 Wood Trimmer.
3 5-drawer Wood Filing Cabinets.
1 Door Drawing File.
1 Wood Bench with vise.
1 Band Saw Filing Machine (No Value).
1 Wood Trimmer.
2 Wood Filing Cabinets (20 drawers each).
1 Set 18 Compartment Comb. Filing Cabinet. (No value).

In Wash Room

1 Columbia Hotwell Heater.
3 72-section Clothes Lockers.
4 Wood Benches.
2 Lunch Tables (wood) seats attached.

In Machine Shop No. 1

1 14-drawer Blue Print Cabinet and cupboard.
1 Bell.
2 Sections Small Drawers for templets.
4 Vises.
1 Belt Lacer.
3 Surface Plates.

1 Shaper Chuck.
2 Adjustable Roller Stands.
1 4-wheel hand truck.
1 Vise in stand.
1 Clutch Chuck.
1 Vise.
1 Bell Tester & Blow Torch.
1 Lot Wrenches.
1 Lot Milling Cutters, etc.
1 Lot Milling Cutters.
1 Work Bench, metal legs.
1 Pattern Maker's Bench & Vise.
1 Vise & Bench.
1 Wooden Bench with drawers.
[fol. 11]
7 Jacks (1 Hydraulic, 6 lever).
Grindstone and stock castings.
1 Surface Plate.
Vise and Wood Bench.
1 Turpentine Tank.
2 Hand Trucks.
1 Howe Platform Scale, 1000#, (156W).
1 Platform Scale (159W) 6000#.
1 Steel Dump Bucket.
1 Lot (5) Hand Trucks.
1 Lift Truck.
2 Sling Chains.
12 Lifting Chains. (Hook.)
2 Single Hook Chains.
1 3-Hook Chain.
1 2-Hook chain.
2 2-hook Chains.
4 Chains (3 double, 1 single hook).
2 Grab Hooks & 1 Sling Chain.
1 Counter Platform Scales (158W).
1 Vise & Table.

In Stock Room

1 Section Steel Bins.
1 Steel Rack, 1 section.
1 Chain Block.
1 Steel Cabinet, (1 section).
1 Steel Cabinet.

1 Steel Cabinet & Candles.
1 Steel Cabinet.
1 Steel Cabinet.
1 Steel Cabinet.
1 Steel Cabinet.
1 Steel Cabinet.
1 Steel Cabinet.
1 Steel Cabinet.
1 Steel Cabinet.
1 Steel Cabinet.
1 Cabinet (Steel).

In Machine Shop No. 2

1 Coal Dump Bucket.
1 Chain Block.
1 Truck (Hand).
2 Straightening Presses.
1 Wood Work Bench & Vise.
1 Chain Block.
[fol. 12]
1 Table (Iron Legs) and Card Rack.
1 Lot Lathe Dogs.
1 Winch, Hand Power.
1 Wooden Shaving Cart, full.
1 Lot (4) Hand Trucks.
1 Smith's Anvil.
1 Lot Smithing Tools.
1 Smith's Anvil.
1 Howe Platform Scale (161W).
1 Portable Platform Scale (157W).
1 Chain Block.
1 Chain Block.
1 Chain Block.
1 Lot Sledge Hammers (10).
1 Lot Stock Grab Hooks.
2 Chains.
1 Chain.
1 Chain.
1 Chain.
1 Chain.
1 Lot (2) Chains.
1 Lot (4) Chains.
1 4-wheel Iron Frame Truck.

1 Chain Block.
1 4-wheel Truck.
2 Metal Circular Saws.
1 Bench & Vise.
1 Lot Gauges, Jigs & Sundry Tools.
1 Lot Gauges, Tools & Jigs.
1 Lot Milling Cutters.
1 Lot Milling Cutters.
1 Wood Bench & Misc. Collars & Tools.
1 Lot of Tools of various kind.
1 Lot Reamers, Drills & Various Tools.
1 Lot Shell Reamers.
1 Lot Pipe Cutters, Dies, etc.
1 Lot Drills & Taps.
1 Lot Hand Rachets.
1 Lot Reamers & Taps.
1 Lot Drills & Taps.
1 Lot Taps.
1 Lot Reamers & Counterbores.
1 Lot Drills & Reamers.
1 Lot Counterbores, etc.
1 Lot Reamers.
1 Set of Fixtures for 1 G. (Belong on Machine No. 655).
1 Small Chuck (Belongs on 1 G No. 655)
1 Air Drill.

[fol. 13]

1 Air Drill.
1 Wood Bench & Vise Att.
1 Small Lathe Grinder.
1 Lot Chucks & Reamers.
1 Lot Metal Figures & Holders.
Center Grinders.
1 Internal Grinder.
1 Air Drill.
1 Lot (4) Wood Work Benches.
1 Horse or High Trestle.
1 Chain Block (47H).
1 Lift Truck.
1 Work Bench & 6 Vises attached.
5 Hand Trucks (one 2 wheel, four 5 wheel).
1 Lift Truck.
1 Lot Misc. Drills.
1 Air Drill.
1 Air Drill.

1 Air Drill.
1 Air Drill.
1 Air Drill.
1 Lot (24) Air Hammers.
3 Air Grinders.
1 Wood Bench.
1 Anvil.
1 Heating Forge.
1 Surface Plate.
1 Lot Misc. Wrenches, etc.
1 Pipe Vise on Bench.
1 Pipe Cutter, 6″.
2 Pipe Stocks & Dies.
1 Pipe Vise.
1 Handle for 707 Pipe Cutter (Belongs with No. 707).
3 old anvils.
1 Lot (5) Wood Trestles.
1 Work Bench with Vise Attached.
1 Work Bench with Vise Attached.
1 Section Air Hose.
1 2-Hook Heavy Chain.
1 Lot (2) Chains (Lift).
1 Lot (3) Chains (Lift).
1 Lot (5) Chains.
1 Lot (2) Chains.
1 Lift Chain, Double Hook.
1 Lot (3) Chains, Double Hook.
1 Lot (2) Chains, double.
1 Rope Block & Chain.
1 Lift Chain.

[fol. 14]

1 Wood Buck on Rollers.
2 Wood Horses.
1 Thompson Houston 20 H. P. Motor.
1 Work Bench & 3 Vises attached.
1 Canvas Frame (Photo Background).
1 Work Bench & 5 Vises attached.
Taps, Drills, etc.
1 Lot (11) Sling Chains (Double and Single).
1 Lot (9) Screw Jacks and 1 Lever Jack.
1 Lot (12) Screw Jacks.
1 Sheet Metal Hand Punch.
Grab Hooks.

1 Reel with rope.
2 2-wheel Carts.
Sundry Tools.
1 Lot Scrap Cutters (11).
14 Milling Cutters
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Double Sling Chain.
1 4-Hook Heavy Duty Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
1 Sling Chain.
2 Sling Chains.
1 Plymouth Industrial Locomotive & Truck.
3 Small Service Plates (on Bench but not attached).
1 *Kit (5) Drawer Reamers, Taps & Wrenches* (on bench but not attached).
1 Lot Air Hose.
1 Lot (3) 4-wheel Hand Trucks.
[fol. 15]
1 3-Hook Sling Crain.
2 2-Hook Sling Chains.
1 3-Hook Sling Chain.
1 2-Hook Sling Chain.
1 3-Hook Sling Chain.
1 Lot Air Hose.
1 Lot Sand Clamps, Chain & Sundry Parts.

1 1½ Yd. Grab Bucket.
1 Lot (6) Wheelbarrows.
1 Flask Turning Hook & Bar.
1 Tabor Molding & Jolting Machine.
\ Lot (9) Hand Ladles.
/ Squeezer & Jolter on floor.
1 Vise.
1 Anvil.
1 Anvil.
1 Lot (8) Hand Ladles.
1 Oil Drying Torch.
1 Iron Ladle, 8T.
1 Iron Ladle, 12T.
1 Iron Ladle, 10T.
1 Iron Ladle, 6T.
1 Iron Ladle, 4T.
1 Iron Ladle, 3T.
1 Iron Ladle, 2T.
1 Iron Ladle, 800#.
1 Iron Ladle, 1200#.
1 Lot Swivel Hooks.
1 4-Hook Chain.
2 4-wheel Industrial trucks.
1 Wood 4-drawer Filing Cabinet.
1 Testing Scale (Iron).
1 Blackening Gun & Hose.
3 Core Drying Trucks, included in price of ovens.
1 2-hook Chain & 2 Grab Hooks.
1 Small Core Oven on Foundation.
3 Core Racks & Cores (Wood) No Value.
1 Hand Rod Shear.
1 Old Anvil.
1 Lot Core Plates.
1 20-section Steel Locker.
1 36-section Steel Locker.
1 28-section Steel Locker.
1 12-section Steel Locker.
1 Chain Block & Chain.
1 Bench (Wood) & Vise.
1 Lever Jack.

[fol. 16]

1 2-wheel Truck.
1 Air Hose, low pressure.

1 Lot (5 bbls.) Chaplets, also 65 bins chaplets.
1 lot (10) Air Rammers.
1 Bench & Vise.
1 Belt Lacing Machine.
1 Bench & 2 Service Plates.
1 Air Drill & Stand.
1 Wheelbarrow.
1 Lot (14) Coke Cans.
1 Lift Truck.
1 Lifting Scale Truck.
2 Steel Wheelbarrows.
1 Sand Cleaner.

IN UNITED STATES DISTRICT COURT

SUBPŒNA IN EQUITY—Filed August 31, 1933

The President of the United States of America to John C. Schumacher, Sheriff of Butler County, Ohio, Greeting:

You are hereby commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpœna at the Clerk's office of the United States District Court for the Southern District of Ohio, at Cincinnati, Ohio to answer unto the bill of complaint of Ralph K. Beeler, Trustee in Bankruptcy of The Long & Allstatter Company, Bankrupt, in said Court exhibited against you. Hereof you are not to fail at your peril and have you then and there this writ.

Witness the Honorable Robert R. Nevin, United States District Judge at Cincinnati, Ohio, this 26th day of August, A. D. 1933.

Harry F. Rabe, Clerk, by H. E. Parker, Deputy Clerk.

[fol. 17] Memorandum

The defendant in this case is required to file his answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

U. S. Marshal's Return

Received this writ at Cincinnati, Ohio, on August 26, 1933, and on the same day I served same on the within named John C. Schumacher, Sheriff of Butler County, Ohio, by delivering to him a true copy of this writ, with the endorsements thereon, personally, at Hamilton, Ohio. And on the same day I served the said John C. Schumacher, Sheriff of Butler County, Ohio, with a certified copy of — Order in this cause, issued August 26, 1933, by delivering said certified copy to him personally at Hamilton, Ohio.

Paul H. Creswell, U. S. Marshal, S. D. O., by G. A. Reeves, Deputy.

And on August 28, 1933 I made further service in this cause by delivering to the within named John C. Schumacher, Sheriff of Butler County, Ohio, a copy of Bill in Equity in this cause, personally at Hamilton, Ohio.

Paul H. Creswell, U. S. Marshal, S. D. O., by John Theobald, Deputy.

In United States District Court

Notice of Application for Restraining Order—Filed August 26, 1933

To John C. Schumacher, Sheriff of Butler County, Ohio:

You will take notice that in the above entitled cause the undersigned will on Saturday, August 26, 1933, at 9 [fol. 18] o'clock A. M., apply to the Honorable Benson W. Hough, Judge of the United States District Court, for the Southern District of Ohio, Eastern Division, at Columbus, in said district, for a temporary restraining order restraining and enjoining you from conducting or permitting to be conducted a sale on execution on the judgment in cause No. A-30454 on the dockets of the Court of Common Pleas of Hamilton County, Ohio, entitled: A. Hunter Willis, Plaintiff, vs. The Long & Allstatter Company and F. B. Yingling, Defendants. This notice is given pursuant to law.

Brandon R. Millikin, Attorney for Ralph K. Beeler, Trustee in Bankruptcy of The Long & Allstatter Company, Bankrupt.

Receipt of the above notice is acknowledged this 25th day of August, 1933.

John C. Schumacher, Sheriff of Butler County, Ohio.

IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER—Filed August 26, 1933

On application of Ralph K. Beeler, Trustee in Bankruptcy of The Long & Allstatter Company, Bankrupt, filed in the District Court of the United States, for the Southern District of Ohio, Western Division, at Cincinnati on the 24th day of August, 1933, and for good cause shown, an order is hereby issued temporarily restraining and enjoining John C. Schumacher, as Sheriff of Butler County, Ohio, from proceeding with or permitting the sale on August 28, 1933, or upon any other day, of any of the property of said bankrupt set forth in Exhibit 1 attached to the petition in above cause, until it be determined, either in this proceeding or in a proceeding before Honorable William Jerome Kuertz, Referee in Bankruptcy at Cincinnati, Ohio, [fol. 19] as to whether or not the property set forth in Exhibit 1 of said Petition are fixtures and a part of the manufacturing plant of said bankrupt and therefore assets of said bankrupt estate to be administered by said Trustee.

Hough, District Judge.

9:30 A. M., August 26th, 1933.

IN UNITED STATES DISTRICT COURT

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND DISMISS CAUSE—Filed August 30, 1933

Now comes John C. Schumacher, the duly elected, qualified and acting Sheriff of Butler County, Ohio, named as the defendant herein, and represents to the court as follows:

1. That by virtue of a writ of execution issued by the Court of Common Pleas of Hamilton County, Ohio, on June 10, 1932, on a judgment rendered by said court on

said day in cause No. A-30454 on the docket of said court, wherein A. Hunter Willis was plaintiff and The Long & Allstatter Company, a corporation under the laws of Ohio, and F. B. Yingling were defendants, he levied, on June 16, 1932, upon all the personal property of The Long & Allstatter Company as well as the real estate of said company.

2. That on August 8, 1932, he made a return of this writ of execution stating that he had levied upon the following personal property of the said The Long & Allstatter Company:

All personal property situated, located and being in the plant of The Long & Allstatter Company, situated on High Street, between Fourth and Fifth Streets, and bounded on the North by Butler Street, and located on real estate known as Outlot No. 16 in the City of Hamilton, Butler County, [fol. 20] Ohio, and including the following: All office fixtures, furniture and supplies in said plant; all drafting tables and equipment in said plant, all raw materials; all manufactured products, machinery and parts, and products, machinery and parts in the process of manufacture in said plant, of every nature and kind whatsoever, whether finished or unfinished; all gears, forgings and castings, both rough and finished, for Oldroyd Coal Cutting Machines; also blue prints, patterns, jigs, dies, designs, drawings and specifications for said Oldroyd Coal Cutting Machines, and all bolts, rough stock and raw material for the manufacture of said Oldroyd Coal Cutting Machines, located in said premises; all other machinery of every kind whatsoever not a part of the realty; all tools, equipment and supplies of every kind whatsoever.

3. That attached to his return of the 4th alias order of sale issued on May 1, 1933, on said execution and judgment and returned by him on June 29, 1933, he made and returned an inventory of the personal property so levied upon by him and remaining unsold, a copy of which is hereto attached and made a part hereof, marked Exhibit A.

4. That by advertisement duly published in a newspaper published and of general circulation in Butler County, Ohio, to-wit: The Hamilton Journal News, he advertised the personal property, so levied upon by him as afore-

said, for sale, at public auction, on Monday, August 28, 1933, between the hours of 10 and 11 o'clock A. M. Said advertisement described said personal property as follows:

All personal property situated, located and being in the plant of The Long & Allstatter Company, situated on High Street, between Fourth and Fifth Streets, and bounded on the North by Butler Street, and located on real estate known as Outlot No. 16 in the City of Hamilton, Butler County, Ohio, and including the following: All office fixtures, furniture and supplies in said plant; all drafting tables and equipment in said plant, all raw materials; all manufactured products, machinery and parts, and products, machinery and parts in the process of manufacture in said plant, of every nature and kind whatsoever, whether finished or unfinished; all gears, forgings and castings both [fol. 21] rough and finished, for Oldroyd Coal Cutting Machines; also blue prints patterns, jigs, dies, designs, drawings and specifications for said Oldroyd Coal Cutting Machines, and all bolts, rough stock and raw materials for the manufacture of said Oldroyd Coal Cutting Machines, located in said premises; all other machinery of every kind whatsoever not a part of the realty; all tools, equipment and supplies of every kind whatsoever.

5. That on August 26, 1933, he was served with a copy of a temporary restraining order made and issued herein on said day temporarily enjoining him from proceeding with said sale of said personal property.

And the said John C. Schumacher, Sheriff of Butler County, Ohio, and defendant herein as aforesaid, without entering his appearance herein and solely for the purposes of this motion, moves the court to dissolve said temporary restraining order and to dismiss this suit for the following reasons to-wit:

1. This court is without jurisdiction to entertain a suit in equity in this matter against this defendant.

2. This court is without jurisdiction and authority to issue a temporary restraining order herein enjoining this defendant from proceeding with said sale.

3. Said temporary restraining order was issued without bond.

4. The items included in said inventory have been found by the Court of Common Pleas of Hamilton County, Ohio, to be personal property and subject to sale as such, and said order and judgment has become res adjudicata and is entitled to full faith and credit under the Constitution and laws of the United States.

5. All of the items included in said inventory of said Sheriff are in fact and in law personal property and subject to sale as personal property under the execution and orders of sale issued by the Court of Common Pleas of Hamilton County, Ohio, in said case No. A-30454.

John C. Schumacher, by Paul A. Baden, Pros. Atty., Butler County, Ohio. Peck, Shaffer & Williams, Coleman Avery, His Attorneys.

[fol. 22] EXHIBIT A TO MOTION TO DISSOLVE, ETC.

Inventory

Production Office

1 Steel Cabinet, 4 x 6
1 Wood Hat Rack
4 Steel Office Desks, 5 x 3
2 Typewriter Steel Desks, 4 x 3
1 Wood Office Deck, 3 x 5
1 Wood Stool Desk, 6 x 3
2 Steel 4-drawer Filing Cabinet, Art Metal
1 Steel 10-drawer Filing Cabinet, Art Metal
1 8-drawer Filing Cabinet, Art Metal (Steel)
1 6-drawer Steel Filing Cabinet, Art Metal
1 Drawing Table
1 Burroughs Adding Machine—#9, serial #130324
1 Wood Table, 2½ x 6, 2-drawer
1 11-drawer Wood Blue Print Cabinet
1 2-door Wood Table
2 Iron Fireproof Safes, MacNeil & Urbin
5 Wood Swivel Back Chairs
4 Straight Back Chairs
1 Wood Stool
1 General Electric Fan, 15 inch
1 General Electric Fan, 15 inch

Information Room

1 Steel Art Metal Table, 3 x 2
2 12-drawer Art Metal Steel Filing Cabinets
1 Steel Art Metal Typewriter Desk, 4 x 3
1 Steel Hat Rack
1 12-inch General Electric Fan
2 Straight Back Office Chairs
2 Swivel Wood Office Chairs
1 Glass Front Wood 1-section Book Case
1 Electric Desk Lamp

Secretary's Office

2 Roll Top Steel Office Desks, 3 x 5½
2 Electric Desk Lamps
2 Steel Tables, 5 x 3
2 Swivel Chairs
5 Straight Chairs
1 Hall Tree

Engineering Office

1 Roll Top Desk, 3 x 5½
1 Steel Table, 5 x 3
[fol. 23]
1 Steel Table, 4 x 2½
1 4-section Wood Book Case
1 Swivel Chair
5 Straight Chairs
1 8-drawer Art Metal Steel Cabinet
1 Hall Tree
2 Desk Lamps
1 12 inch General Electric Fan
1 Steel Waste Paper Basket

Purchase and Traffic Office

2 Roll Top Steel Desks, 3 x 5½
2 Steel Tables, 5 x 3
1 Steel Typewriter Desk, 4½ x 2′ 10″, 6-drawer
1 Steel Typewriter Desk, 3′ 10″ x 2′ 10″, 3-drawer
1 4-drawer Steel Filing Cabinet
2 4-drawer Steel Filing Cabinets with legs
1 3-drawer Filing Cabinet (low)
1 12-drawer Filing Cabinet

1 9-drawer Filing Cabinet
1 1-section Wood Book case
4 Swivel Office Chairs
4 Desk Lamps
4 Straight Chairs
1 8-door Glass Front Cupboard
1 Billing Machine
1 12 inch Electric Fan
1 Parcel Post Scale
1 Hall Tree

Accounting Office

3 Roll Top Desks, 3 x 5½ (Steel)
1 Typewriter Desk, 6-drawer (Steel)
1 Steel Typewriter Desk, 3-drawer
1 Steel Table, 5 x 3
1 Steel Desk (Steel) 2′ 4″ x 9′ 6″
5 Swivel Chairs
6 Straight Chairs
1 9-drawer Filing Cabinet (Steel)
1 14-drawer Filing Cabinet (Steel)
1 10-drawer Filing Cabinet (Steel)
1 Wood Section Book Case
1 Burroughs Adding Machine, #3898350
5 Desk Lamps
1 Sunstrand Adding Machine, #127281
1 Hall Tree
1 Steel Safety Cabinet, 4 x 6 (two doors)
[fol. 24]
1 15 inch Westinghouse Electric Fan
3 Steel Waste Baskets

Director's Meeting Room

1 Steel Table, 5 x 3

Lobby

1 4-section Steel Locker
1 10-Section Steel Locker
2 5-section Steel Lockers
2 Wooden Benches
1 Swivel Chair
1 Straight Chair

Superintendent's Office

1 Steel Typewriter Desk, 3-drawer
1 Steel Locker
1 Copy Machine
4 Straight Chairs
1 Swivel Chair
1 Desk Lamp
1 Smith Typewriter, #10
1 Parcel Post Scale

Blue Print Room

1 Photo-Stat Machine
1 Blue Print Dryer
1 Blue Print Machine (Buckeye Engine Co.)
1 Blue Print Washer
1 Wood Table, 3½ x 5

Drawing Room

9 Drawing Boards
1 Wood Top Desk, 4½ x 2' 8"
1 Swivel Chair
9 Stools
1 Art Metal 6-drawer Blue Print Cabinet
1 Art Metal 3-drawer Blue Print Cabinet
1 Art Metal 7-drawer Blue Print Cabinet
4 Wood Filing Cabinets, 5-drawer
4 Wood Filing Cabinets, 6-drawer
1 36-drawer Wood Filing Cabinet
1 4-drawer Wood Filing Cabinet
2 11-drawer Wood Filing Cabinets

[fol. 25]

2 15-inch General Electric Fans, #1405735 and #1409953
1 24-drawer Wood Blue Print Filing Cabinet
10 Desk Lamps
1 12-Drawer Wood Cabinet
1 Clock, Chicago Time Recorder

Pattern Room

10 Wood Pattern Making Benches with Vises
1 Wood Pattern Making Bench without Vise
1 Wood Work Bench

1 Wood Desk
2 6-drawer Wood Record Cabinets
3 5-drawer Wood Filing Cabinets
1 1-drawer Wood Filing Cabinet
1 Wood Card Cabinet
1 Wood Table
4 Wood Trimmers
3 Metal Pattern Stamping Machines
1 5X16" Motor Driven Disc. Sander, (bolted)
1 4X Vertical Disc. Sander, Motor attached, (bolted)
1 12-Section Clothes Locker
1 1X 36" Band Saw, motor attached (bolted)
1 14X Jointer, motor attached, (bolted)
1 13X Single Surfacer, motor attached (bolted)
1 15X Saw Table, (bolted)
4 Wood Trucks
1 Lot of Patterns, L. & A.
1 Lot of Patterns, Columbia Machine Tool
1 27X Wet Tool Grinder, motor atached (bolted)
1 28X Pattern Maker Lathe, (bolted)
1 Lot of Patterns Bolt Rods
1 Band Saw Fling Machine
1 Room "A" Pattern Storage
1 Cellar Storage Room

Wash Room

3 72-section Clothes Lockers
2 Lunch Tables (Wood) seats attached

Machine Shop No. 1

1 lot of Patterns, L&A. and Columbia Machine Tool
1 4H Crane Head Power, 18'
4 Vises bolted to bench
[fol. 26]
3 Service Plates
1 lot of Old Royd Jigs
8 Old Royd Boring Bars and 10 Bushes
20 L. & A. Mandrels
4 Clutch Benches (bolted)
15 Rolls of Scrap Belting
1 Belt Lacing Machine, #184783
1 Work Bench
13 Wood Tressels

1 #27P 32″ Columbia Crank Shaper, motor attached (bolted)
1 #28P Columbia Crank Shaper, motor attached (bolted)
1 #26 P 20″ Columbia Crank Shaper, motor attached (bolted)
1 #3S Die Slotter, 2½″ (bolted)
1 #9E Motor, 11 H. P., #13094 (bolted)
1 #4S Key Seatter, 12″ (bolted)
1 4-wheel Truck
1 #6B 24″ Verticle Boring Mill, motor attached (bolted)
1 #8B 36″ Verticle Boring Mill, motor attached (bolted)
1 #5B old style Boring Mill, motor attached (bolted)
1 #5S 10″ Slotter, Pratt & Whitney, (bolted)
1 #1S 24″ Slotter, Sellers (bolted)
1 #2S 20″ Slotter, Niles (bolted)
1 #12M number 4 Cincinnati Milling Machine, motor attached (bolted)
1 #13M number 5 Cincinnati Milling Machine, motor attached (bolted)
1 #7M 36″ Cam Cutter, Garvin, (bolted)
1 #10P 32″ x 32″ x 8′ Planner, Gray, (bolted)
1 #9P 30″ x 30″ x 8′ Planner, Gray, (bolted)
1 10 H. P. Wagner Electric Motor, #345315
1 Allis Chalmers 10 H. P. Motor, #9757K
1 Allis Chalmers 10 H. P. Motor, #84655
1 17G Double End Emery Grinder, (bolted)
1 #3B Verticle Boring Mill, (bolted)
1 #60E 25 H. P. General Electric Motor
1 #9B 72″ Boring Mill, motor attached #4548848 (bolted)
1 #4B 5″ Boring Mill, Niles, (bolted)
1 10 H. P. Wesche Motor
1 #11M 36″ x 32″ x 12′ 4H Ingersoll Milling Machine, motor attached, (bolted)
1 #9H Swinging Gib Crane

[fol. 27]

1 Yale Triplex Block Crane
1 H2 18′ Hand Power Travel Crane
1 #25P 42″ 10′ Planner, (bolted) 2 motors attached
1 #5P 44″ x 44″ by 12′ Planner, Niles, motor attached, (bolted)
1 #6P 60″ x 60″ by 12′ Planner, Gray, motor attached, (bolted)

1 #7P 42″ x 42″ by 14′ Planner, Hamilton Machine Tool (bolted)
1 18 H. P. Westinghouse Motor #324072
1 #8P 36″ x 36″ x 12′ Planner, Hamilton Machine Tool (bolted)
1 10 H. P. Allis Chalmers Motor
1 #4D 5′ Radial Drill, Niles
1 #2D 6′ Radial Drill, Hamilton Machine Tool (K. D.)
1 6′ Shaper, Henderson (K. D.)
10 Sling Chains
1 #6D 42″ Drill Press, Cincinnati Milling Machine (bolted)
1 #5D 40″ Drill Press, New Haven, (bolted)
1 #2B 4½″ Horizontal Boring Machine, Niles, (bolted)
1 #74E 7½ H. P. Motor #D7195G
1 H 16 Swing Gib Crane
1 #18D 6′ Universal Drill Press, Niles, motor attached, #19701 (bolted)
1 #17D 6′ Universal Drill Press, Niles, motor attached, #19702 (bolted)
1 #1D 5′ Radial Drill, Niles, motor attached
1 Jack Lift Truck
1 Iron Dump Bucket, capacity about 1½ yard
1 #1T 42″ x 30′ Engine Lathe, motor attached, (bolted)
1 25T 36″ x 28′ Engine Lathe, motor attached, (bolted) Niles
1 #100P 144″ x 36″ Gear Shaper, motor attached (bolted)
1 #102P 77″ x 24″ Gear Shaper, motor attached (bolted)
4 Trucks
6 Wheel Barrows
1 2-wheel Truck
1 #3M 24″ x 8′ Gear Shaper, Gleason, (bolted)
1 #1M 48″ Gear Cutter, Brainan, (bolted)
1 #2M 60″ Gear Cutter, Brown & Sharp (bolted)
1 #5T 28″ x 18′ Engine Lathe, Bardford, (bolted)
[fol. 28]
1 #26T 22″ x 16′ Engine Lathe, (bolted), motor attached
1 #27T 19″ x 12′ Engine Lathe, LeBlond, motor attached (bolted)
1 #1H 18″ Hand Power Travel Crane
1 #3T 24″ x 26′ Engine Lathe, Niles, (bolted)
1 Wood Bench with Vise and Stamping Block

1 #4T 20″ x 12′ Engine Lathe, (bolted)
1 #11T 22″ x 11′ Engine Lathe, Hamilton Machine Tool (bolted)
1 #28T number 5 Turret Lathe, Warren & Swasey, motor (attached) bolted
1 #19T 2″ x 26″ Turret Lathe, Pratt & Whitney, (bolted)
1 #18T 3″ x 36″ Turret Lathe, Pratt & Whitney, (bolted)
1 #8T 16″ x 8′ Engine Lathe, (bolted)
1 #6T 20″ x 10″ Engine Lathe, (bolted)
1 #9T 18″ x 8′ Engine Lathe, (bolted)
1 #7T 20″ x 10′ Engine Lathe, (bolted)
1 #12T 18″ x 8′ Engine Lathe, (bolted)
1 Chain Block, ½ ton capacity
1 #69E General Electric Motor, 20 H. P.
1 Westinghouse 20 H. P. Motor #49986
1 Kester 15 H. P. Motor
1 Westinghouse 7¼ H. P. Motor
1 #1C number 16 Cold Saw
1 #3C 14″ Rip Cut Saw
1 #36E 7½ H. P. Westinghouse Motor
1 18′ Span Hand Power Hoist over Steel Rack

Machine Shop No. 2

1 17X 16″ Oil Extractor
1 #157W Steel Bar Scale
1 #37X Nazel Hammer #731
1 Tempering Furnace for coal
1 Tempering Furnace for gas
2 Smith Forges
1 Smith Blower and Motor
2 Anvil Irons
1 lot Blacksmith Tools
1 #18H Gib Crane
1 161W Howe Scale, #750
1 20B Niles Horizontal Boring Mill, motor attached (bolted)
1 #4M 21″ x 16″ x 8′ Slab Mill, (bolted)
1 9G 36″ Wet Tool Grinder
[fol. 29]
1 5G 12″ Wet Tool Grinder
1 18X number 4 Bolt Cutter
1 108A number 4 6″ Center Machine, (bolted)
1 107A number 3½ Arbor Press, Greenerd

1 106A number 6 Arbor Press, Greenerd
1 Jack Lift Truck
1 #5 Gate Shear, 6′, New
1 #5 Gate Shear, 8′, New
5 Air Hammers
7 Air Drills
1 Air Grinder
8 Work Benches, (bolted)
21 Vises (bolted)
3 L. & A. Bar Benders, New
1 12D 21″ Drill Upright
1 8D 30″ Drill Upright
1 9D 30″ Drill Upright
1 11D 10″ Friction Drill
1 14D 5′ Radial Drill
1 Horse Tressel
1 29X Single Power Punch
1 31 x 36″ x 8′ Air Tank
5½ x 4½ Air Compressor, motor attached #37154
1 15G 24″ Cutter Grinder, motor attached
1 Work Bench
1 Vise
1 Dolly
1 L. & A. Open Side Planner, New, (K. D.)
1 1B 5½ Horizontal Boring Mill, motor attached
1 H10 Gib Crane
1 8M 54″ Milling and Boring Machine, Ingersoll, motor attached (bolted)
1 1P 84″ x 72″ by 18′ Open Side Planner, Dietrick & Harvey, motor attached, (bolted)
1 10 H. P. Wente Electric 4361988 Motor
1 10G Double End Grinder
30 Sets of Lifting Chains
1 16G 8′ Radial Drill, motor attached
1 Plymouth Locomotive #646
1 Car for Locomotive
1 L. & A. Press Brake, B. B. 10, 120 ton, New
1 Service Plate 6′ x 15′
1 Anvil
2 25 ton Traveling Cranes, Case
3 5D Press, 48 L. & A., New
1 L. & A. #3 Gate Shear, New

[fol. 30]

1 Thompson & Hudson 20 H. P. Motor, #3364, 33E
2 D66 Press, L. & A., New
1 15D 8′ Radial Drill, motor attached
1 11P 48″ x 48″ x 20′ Open Side Pan*n*er, Liberty motor attached, (bolted)
1 3P 72″ x 48″ x 14′ Gray Plan*n*er, motor attached
1 2P 72″ x 60″ x 20′ Gray Planner, motor attached

Foundry

1 lot Foundry Flask
1 10-ton Northern Traveling Crane
2 30-ton Whiting Traveling Cranes
2 5-ton Northern Traveling Cranes
1 1½ yard Grab Bucket
9 Foundry Lad*d*les
1 Toledo No-Spring Scale, #745681
1 Sand Slinger, (bolted)
1 Sand Mixer, (bolted)
1 5 H. P. Motor
1 Cross-cut Saw and Motor
1 3-section Clothes Locker
1 Iron Testing Scale
1 Table
1 Time Clock (built in)

Stock Yard

1 10-ton Northern Traveling Crane
1 pile of Scrap
2 Scrap Lad*d*les
Approximately 15 ton of Coke

Blower Room

65 Bins of Chaplets (mixed)
1 Root Blower, motor attached
1 Blower
1 Air Compressor complete
1 General Electric Blower and Motor

Charging Floor

15 Coke Cans
50 Bags of See Coal

1 Lifting Truck
1 Lifting Truck Scale

[fol. 31] Tool Room

1 7G Dry Drill Grinder
1 1G number 2 Universal Cutter
1 5M 1½ Universal Milling Machine
1 6M 2½ Rockford Milling Machine
1 21T 14" x 6' Engine Lathe
1 lot of Gear Cutters
1 lot of Taps
1 lot of gauges, males and females
1 lot of Reamers
1 lot of drills
1 lot of Sizers
1 Vise

Carpenter Shop

1 20X Cross-cut Saw, (bolted)
1 21X number 3 Automatic Circular Saw Sharpener
1 25 H. P. Thompson & Hudson Motor
1 22X 24" Circular Saw Sharpener

Grinding Room

1 Sand Stone Side Grinder and 20 H. P. Motor
1 32X 52" Gate Shear and 15 H. P. Motor
1 48X Rotary Splitting Shear
1 Bending Roll

Machine Shop No. 1 (cont'd)

1 Yale & Towne 20-ton Crane
1 24" Punch, #1, New
1 7½ H. P. Westinghouse Motor, #975831
1 10 H. P. Westinghouse Motor, #950117
1 20 H. P. Westinghouse Motor, #2221510
1 Fairbanks 20 H. P. Motor, #48192
1 L. & A. Lever Shear, New
1 General Electric 25 H. P. Motor, #5178689
1 Assortment of Jigs
1 #2 Punch and Shear, L. & A., New
1 5" Tire Welder, New
1 #4 Combination Punch and Shear
1 #6 Alligator Shear

3 #30 Presses
1 Bending Roller
1 Traveling Crane, 5-ton Casing, motor attached
2 Drop Hammers, #200 L. & A.
[fol. 32]
1 #6 Multiple Press, L. & A.
2 #6 Combination Punch & Shear, L. & A.
1 #2 Combination Punch & Shear, L. & A.
1 Assortment of Old Royd Castings and Gears
1 Trip Hammer, L. & A., New
1 8′ Casting Body
1 6G Wet Cutter Grinder
1 Assortment of Jigs, L. & A.

Storage Room

Assortment of Old Royd Patterns
Assortment of L. & A. Stock Gears

Stock Room

Assortment of Joint Bolts, 5/8′ to 1 3/8″
Assortment of Shear Bolts,
Assortment of Face Plate Bolts
Assortment of Hex Nuts
Assortment of Slotted Nuts
Assortment of Head Pins
Assortment of Taper Pins
Assortment of Slotter Pins
Assortment of Cap Screws
Assortment of Set Screws
Assortment of Miscellaneous Screws
Assortment of Round Head Screws
Assortment of Studs
Assortment of Washers
Assortment of Babbit-s
Assortment of Oil Cups
Assortment of Head Keys
Assortment of Straight Keys
Assortment of Richard Nuts
Assortment of Richard Punches
Assortment of P. & W. Punches
Assortment of P. & W. Nuts
Assortment of Springs
Assortment of Wrenches

Assortment of Mild Steel Bars
Assortment of Tool Steel Bars
Assortment of Cold Rolled Steel Bars

Stock

Assortment of Cast Iron Parts, Rough
Assortment of Steel Parts, Rough
Assortment of Brass Plate Stock
[fol. 33]
Assortment of Nails
Assortment of Tool Bits
Assortment of Electric Supplies
Assortment of Hand Files
Assortment of Pipe Fittings
Assortment of Tool Holders
Assortment of Window Glass
Assortment of Oils
Assortment of Shellac
Assortment of Paste
Assortment of Wood Screws
Assortment of Wood Dowell Pins
Assortment of Taps
Assortment of Grinding Wheels
Assortment of Cast Iron Parts, Finished
Assortment of Cast Steel Parts, Finished
Assortment of Balance Spring Rods
Assortment of Punch Stock
Assortment of Shear Blades
Assortment of Mild Steel Parts
Assortment of Yoke End Forgings
Assortment of Pulleys
Assortment of Beltings
Assortment of Line Shafts

John C. Schumacher, Sheriff Butler County, Ohio,
by A. E. Linkins, Deputy.

Expenses of Taking Inventory

Raymond Warndorf $20.00

In United States District Court

Answer—Filed September 11, 1933

Now comes the defendant and hereby withdraws the motion to dissolve the temporary restraining order issued

[fol. 34] herein and to dismiss this suit hereinbefore filed by him in this cause, enters his appearance herein and hereby consents that this Court may hear and determine all matters referred to in the petition herein.

Defendant admits that on the 21st day of August, 1933 an order was entered in the bankruptcy proceeding of The Long & Allstatter Company by the Honorable William Jerome Kuertz, Referee in Bankruptcy, overruling the motion of A. Hunter Willis calling upon the trustee to disclaim all right to the possession or control of all real and personal property of said bankrupt listed in the inventory and appraisement filed in said bankruptcy proceeding, which order also determined that so much of said property as is real estate, or part and parcel of the real estate, of said bankrupt and appurtenant or affixed thereto, were within the sole jurisdiction and control of the Bankruptcy Court, and that therefore said real estate under the bankruptcy laws was and is in the custody and control of the trustee herein, and that the sale thereof could not lawfully be made of said property except by order of the Bankruptcy Court, all as alleged in said petition. He says that no sale of the property levied on by him was held on August 28, 1933, because of the temporary restraining order issued by this Court.

He says that by virtue of a writ of execution issued by the Court of Common Pleas of Hamilton County, Ohio, upon a judgment rendered by said Court on June 10, 1932, being cause No. A-30454 in said court, wherein A. Hunter Willis was plaintiff and The Long & Allstatter Company, a corporation under the laws of Ohio, and F. B. Yingling were defendants, on June 16, 1932, he levied upon and took possession of all of the property of The Long & Allstatter Company set forth in Exhibit 1 attached to the petition herein, the same having been levied upon by him as personal property of said Company. He says at the same time he levied upon the real estate of said Company, same situate in the City of Hamilton, Ohio. He says that a controversy has arisen as to whether or not certain of said items of chattel property set forth in said Exhibit 1 are in law fixtures and therefore a part of the real estate. He says that it will be necessary before he can make a sale of said property to have determined what if any part of the chattel property so levied upon by him is a fixture and therefore a part and parcel of the real estate owned by said com-

pany, and what part thereof is personal property, so that he may be advised as to what part of the chattel property set forth in Exhibit 1 he has a right to sell under said execution.

[fol. 35] Defendant does not know as a matter of law whether the levy so made by him upon the real estate of said company is or is not a valid levy, and therefore puts the plaintiff on proof thereof.

Wherefore, defendant prays that the Court may hear and determine what part if any of the chattel property levied upon by him and contained in Exhibit 1 are fixtures and therefore a part of the real estate of said company, and that he may be advised and instructed accordingly.

Paul A. Baden, W. C. Shepherd, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

MOTION FOR LEAVE TO WITHDRAW ANSWER—Filed September 12, 1933

Now comes John C. Schumacher, Sheriff of Butler County, Ohio, defendant in the above entitled cause, and moves the Court for leave to withdraw the answer heretofore filed by him in the above entitled action on the 11th day of September, 1933.

John C. Schumacher.

IN UNITED STATES DISTRICT COURT

ORDER SETTING ASIDE TEMPORARY RESTRAINING ORDER—Filed November 6, 1933

This cause came on this day to be heard upon the Application of the Defendant upon two days' notice to the [fol. 36] opposite party to dissolve the temporary restraining order heretofore on August 26, 1933, made and issued herein and the Court being fully advised in the premises finds that said Application is well taken and should be sustained.

Wherefore, it is ordered and considered by the Court that the said temporary restraining order be, and the same

is, hereby set aside and dissolved at the costs of the Plaintiff. To which judgment of the Court plaintiff excepts.

Nevin, U. S. District Judge.

Have seen.

Paul A. Baden, Atty. for Deft., Brandon R. Millikin, Atty. for Pltf.

IN UNITED STATES DISTRICT COURT

ORDER RESTRAINING SALE OF PROPERTY FOR 10 DAYS—Filed November 6, 1933

On application of Ralph K. Beeler, Trustee in Bankruptcy of The Long & Allstatter Company, Bankrupt, Plaintiff, filed in the District Court of the United States, for the Southern District of Ohio, Western Division, at Dayton, Ohio, on the 6th day of November, 1933, and for good cause shown, an order is hereby issued temporarily restraining and enjoining John C. Schumacher, as Sheriff of Butler County, Ohio, for a period of ten days from this date from proceeding with or permitting the sale of any of the property of said bankrupt set forth in Exhibit 1 attached to the petition in above cause.

Defendant excepts, and excepts especially to the granting of this order without bond.

Nevin, U. S. District Judge.

Have seen.

Paul A. Baden, Atty. for Deft. Brandon R. Millikin, Atty. for Pltf.

[fol. 37] IN UNITED STATES DISTRICT COURT

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND DISMISS CAUSE—Filed November 10, 1933

Now comes John C. Schumacher, the duly elected, qualified and acting Sheriff of Butler County, Ohio, named as the defendant herein, without entering his appearance herein, and represents to the court as follows:

1. That by virtue of a writ of execution issued by the Court of Common Pleas of Hamilton County, Ohio, on June

10, 1932, on a judgment rendered by said court on said day in cause No. A-30454 on the docket of said court, wherein A. Hunter Willis was plaintiff and The Long & Allstatter Company, a corporation under the laws of Ohio, and F. B. Yingling were defendants, he levied, on June 16, 1932, upon all the personal property of The Long & Allstatter Company as well as the real estate of said company.

2. That on August 8, 1932, he made a return of this writ of execution stating that he had levied upon the following personal property of the said The Long & Allstatter Company.

All personal property situated, located and being in the plant of The Long & Allstatter Company, situated on High Street, between Fourth and Fifth Streets, and bounded on the North by Butler Street, and located on real estate known as Outlot No. 16 in the City of Hamilton, Butler County, Ohio, and including the following: All office fixtures, furniture and supplies in said plant; all drafting tables and equipment in said plant, all raw materials; all manufactured products, machinery and parts, and products, machinery and parts in the process of manufacture in said plant, of every nature and kind whatsoever, whether finished or unfinished; all gears, forgings and castings, both rough and finished, for Oldroyd Coal Cutting Machines; also blue prints, patterns, jigs, dies, designs, drawings and specifications for said Oldroyd Coal Cutting Machines, and all bolts, rough stock and raw materials for the manufacture of said Oldroyd Coal Cutting Machines, located in said premises; all other machinery of every kind whatsoever not a part of the realty; all tools, equipment and supplies of every kind whatsoever.

3. That attached to his return of the 4th alias order of sale issued on May 1, 1933, on said execution and judgment and returned by him on June 29, 1933, he made and returned an inventory of the personal property so levied upon by him and remaining unsold, a copy of which is hereto attached and made a part hereof, marked Exhibit A. [fol. 38] 4. That on October 30, 1933, the Clerk of the Common Pleas Court of Hamilton County, Ohio issued to him a seventh alias order of sale on the execution and judgment aforesaid, commanding him again to forthwith sell or cause to be sold the personal property levied upon by

him as aforesaid and make due return of this execution to said court within sixty days.

And the said John C. Schumacher, Sheriff of Butler County, Ohio, and named as defendant herein, as aforesaid, without entering his appearance herein and solely for the purposes of this motion, moves the court to dissolve the temporary restraining order heretofore, on November 6, 1933, issued herein and to dismiss this suit for the following reasons, to-wit:

1. This court is without jurisdiction to entertain a suit in equity in this matter against this defendant.

2. This court is without jurisdiction and authority to issue a temporary restraining order herein enjoining this defendant from proceeding with the sale of said property.

3. Said temporary restraining order was issued without bond.

4. The items included in said inventory have been found by the Court of Common Pleas of Hamilton County, Ohio, to be personal property and subject to sale as such, and said order and judgment has become res adjudicata and is entitled to full faith and credit under the Constitution and laws of the United States.

5. All of the items included in said inventory of said Sheriff are in fact and in law personal property and subject to sale as personal property under the execution and orders of sale issued by the Court of Common Pleas of Hamilton County, Ohio, in said cause No. A-30454.

6. This court has already considered the question of said items contained in said inventory, which was attached to a motion for a temporary restraining order, filed on April 4, 1933, in cause No. 10326 in bankruptcy in this court and on April 13, 1933, dissolved the temporary restraining order issued on said motion.

John C. Schumacher, by Coleman Avery, Peck, Shaffer & Williams, Paul A. Baden, His Attorneys.

(NOTE.—A carbon copy of inventory appearing with the "Motion to Dissolve Temporary Restraining Order and Dismiss Cause" filed August 30, 1933, is annexed to this Paper but is omitted here as a duplication.)

[fol. 39] IN UNITED STATES DISTRICT COURT

ORDER GRANTING JURAT ON BILL OF COMPLAINT—Filed November 16, 1933

It appearing to the court that the jurat attached to the bill in equity filed herein was made by the petitioner on information and belief, leave now is given to the petitioner herein to file an amended jurat sworn to positively in accordance with the requirements of the equity rule and that the same may be made upon the original bill filed herein or attached thereto, to all of which defendant excepts.

Nevin, J.

Have seen but do not consent and on the contrary except to entry hereof.

Coleman Avery, Attorney for Defendant.

Have seen.

Brandon R. Millikin, Att. for Pltf.

IN UNITED STATES DISTRICT COURT

ORDER DISSOLVING TEMPORARY RESTRAINING ORDER AND DISMISSING CAUSE—Filed Nov. 16, 1933

This cause came on this day to be heard upon the motion of John C. Schumacher, Sheriff of Butler County, Ohio, named as defendant herein, to dissolve the temporary restraining order heretofore, on November 6, 1933, issued herein and to dismiss this suit, for want of jurisdiction in the court, and was argued by counsel and submitted to the court. And the court, being fully advised in the premises, finds that said motion is well taken and should be granted.

Wherefore it is ordered that the said motion to dissolve said temporary restraining order and dismiss this cause be, and the same hereby is, granted and the said temporary [fol. 40] restraining order set aside and dissolved and said cause dismissed at the costs of the plaintiff.

To all of which plaintiff excepts.

Nevin, District Judge of the United States, Southern District of Ohio, Western Division.

Have Seen.

Brandon R. Millikin, Atty. for Pltf. Coleman Avery, Atty. for Deft.

In United States District Court

Petition for Appeal—Filed Nov. 25, 1933

Now comes Ralph K. Beeler, the duly appointed, qualified and acting Trustee in Bankruptcy of The Long & Allstatter Company, bankrupt, and respectfully represents to the court that on or about the 16th day of November, 1933, this court entered a final order dissolving the temporary restraining order therefore issued in this case and dismissing this cause at the costs of the plaintiff, in which order and judgment of this court and the proceedings had prior thereunto in this cause, certain errors have intervened to the prejudice of this plaintiff, all of which will more fully and at large appear in the assignment of errors filed herewith and this plaintiff does hereby appeal from said order dissolving said temporary injunction and dismissing this cause.

Wherefore, your plaintiff prays that its appeal may be allowed herein to the United States Circuit Court of Appeals for the Sixth Circuit from said order dissolving said temporary injunction and dismissing this cause, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers on which said order was based be made and duly authenticated and sent to the said United States Circuit Court of Appeals for the Sixth [fol. 41] Circuit sitting at Cincinnati, Ohio.

Plaintiff further prays that the court will fix the amount of the appeal bond herein.

Ralph K. Beeler, Trustee in Bankruptcy, The Long & Allstatter Company, by Brandon R. Millikin, His Attorney.

In United States District Court

Assignment of Errors—Filed Nov. 25, 1933

Now comes Ralph K. Beeler, the duly appointed, qualified and acting Trustee in Bankruptcy of The Long & Allstatter Company, bankrupt, plaintiff in the above entitled action and in connection with, and as a part of the petition for appeal makes the following assignment of errors, which it claims occurred in the proceedings in this case, to-wit:

1. The court erred in dismissing the within action for want of jurisdiction.

2. The court erred in dismissing the within action and dissolving the temporary restraining order theretofore issued for the reason that said court did have jurisdiction of said action did have jurisdiction to issue said temporary restraining order and other and further restraining orders and injunctions.

3. The court erred in dissolving said temporary restraining order and dismissing said cause for the reason that the bill of complaint of the plaintiff herein stated a cause of action.

4. The court erred in dismissing said bill of complaint and dissolving said temporary restraining order for the reason that the defendant, John C. Schumacher, Sheriff of Butler County, had consented to the jurisdiction of the court.

[fol. 42] 5. The court erred in entering said order dissolving the temporary restraining order and dismissing the cause for the reason that the defendant, John C. Schumacher, had expressly consented in writing to the court hearing and determining the matters alleged in the petition of the plaintiff herein.

6. The court erred in entering said order dissolving the temporary restraining order and dismissing the cause for the reason that the defendant, John C. Schumacher, Sheriff of Butler County, Ohio, had submitted his person to the jurisdiction of this court and could not thereafter withdraw therefrom nor defeat the jurisdiction of this court to the prejudice of this plaintiff.

7. The court erred in entering said order dissolving said temporary restraining order and dismissing said cause in deciding that diversity of citizenship was necessary to give jurisdiction to this court.

8. The court erred in entering said order dissolving said temporary restraining order and dismissing this cause for the reason that this court had jurisdiction, power and authority upon the filing of the petition herein to protect the jurisdiction of the bankruptcy court and of your plaintiff as trustee in bankruptcy in its possession of the property

set forth and enumerated in the exhibit attached to the bill of complaint herein.

9. The court erred in dismissing said cause without hearing any evidence.

10. The court erred in entering said order dissolving said temporary restraining order and dismissing this cause herein for other errors of law appearing or which will appear on the record when the same is completed.

Brandon R. Millikin, Attorney for Ralph K. Beeler, Trustee in Bankruptcy of The Long & Allstatter Co.

[fols. 43 & 44] In United States District Court

Order Allowing Appeal—Filed Nov. 25, 1933

Upon presentation to the court of the petition of Ralph K. Beeler, Trustee in Bankruptcy of The Long & Allstatter Company, bankrupt, praying for the allowance of an appeal herein, and of the assignment of errors intended to be urged and praying also that a transcript of the record and proceedings, and papers upon which said order and judgment was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Upon consideration whereof the court finds that said petition for appeal ought to be granted and does hereby grant and allow the same. The court further fixes the amount of the appeal bond for such appeal in the sum of $100.00.

Robert R. Nevin, Judge United States District Court, S. D. O.

Bond on appeal for $100.00, approved and filed Nov. 25, 1933, omitted in printing.

[fol. 45] Citation in usual form, showing service on Coleman Avery, filed Nov. 27, 1933, omitted in printing.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME TO FILE RECORD—Filed Dec. 15, 1933

For good cause shown, on application of the complainant herein, the time within which the complainant may prepare [fol. 46] and print the transcript on appeal and file the printed record and make return of the appeal herein to the United States Circuit Court of Appeals for the Sixth Circuit in the above entitled action is hereby extended Sixty (60) days.

Nevin, J.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Jan. 11, 1934

To Harry F. Rabe, Clerk United States District Court:

Please prepare the following pleadings and other papers filed herein for transcript of record to be sent to the printer and thereafter to be filed in the United States Circuit Court of Appeals for the Sixth Circuit.

1. Bill in Equity.
2. Subpœna in Chancery and return of United States Marshal thereon.
3. Notice of application for temporary restraining order, together with receipt of copy of notice by respondent.
4. Order temporarily restraining Sheriff, together with the return of the United States Marshal upon such order.
5. Motion to dissolve injunction and dismiss, filed August 30, 1933.
6. Motion to withdraw answer, filed September 12, 1933.
7. Order dissolving injunction filed November 6, 1933.
8. Order granting temporary restraining order of November 6, 1933.
9. Motion to dissolve injunction and dismiss, filed November 6, 1933.
10. Order granting leave to correct jurat.
11. Order dissolving temporary restraining order and dismissing cause filed November 16, 1933.
12. Petition for appeal.

[fol. 47] 13. Assignment of errors.
14. Order allowing appeal and fixing bond.
15. Bond and approval thereof.
16. Citation.
17. Return of citation showing acknowledgment of service.
18. This præcipe.

Ralph K. Beeler, Trustee in Bankruptcy of the Long & Allstatter Company, Complainant, by Brandon R. Millikin, Attorney.

Service upon me of a copy of above motion is hereby acknowledged this 11th day of January, 1934.

Coleman Avery, Attorney for John C. Schumacher, Sheriff of Butler County, Ohio.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR ADDITION TO TRANSCRIPT—Filed Jan. 17, 1934

Please include in the transcript on appeal in the above entitled case, in addition to the papers specified in the præcipe heretofore filed herein, the order entered December 15, 1933, extending the time for appellant to print and file his record in the Court of Appeals herein.

Also please include the motion to dismiss and dissolve which was filed November 10, 1933, but which was erroneously designated in the former præcipe heretofore filed herein as having been filed on November 6, 1933.

Brandon R. Millikin, Attorney for Ralph K. Beeler, Trustee in Bankruptcy, etc.

[fols. 48-50] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR ADDITIONS TO TRANSCRIPT OF RECORD—Filed February 6, 1934

To Harry F. Rabe, Clerk United States District Court:

Please prepare and transmit to the printer for inclusion in the transcript of the record in the above entitled case, to be filed in the United States Circuit Court of Appeals for

the Sixth Circuit, the answer filed by John C. Schumacher, Sheriff, defendant herein, on or about September 11, 1933, which answer was inadvertently omitted from the original præcipe herein. Also please transmit this præcipe for addition to the record.

Ralph K. Beeler, Trustee, etc., by Brandon R. Millikin, Attorney.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF APPELLEE TO CORRECT ERROR IN RECORD (APPROVED)—Filed February 15, 1934

Now comes appellee, John C. Schumacher, Sheriff of Butler County, Ohio, and suggests to the court that by accident or error there was omitted from the transcript and printed record, heretofore filed herein by appellant, a thing material to appellee, to-wit: the verification, or alleged verification, attached to the petition or bill of complaint in the court below, a certified copy of which said petition or bill of complaint, including said verification or alleged verification, is attached hereto and filed herewith.

Upon said suggestion, appellee moves the court to direct that the omission be corrected by a supplemental transcript in such manner as the court shall order.

John C. Schumacher, Sheriff of Butler County, Ohio, by Paul A. Baden, Prosecuting Attorney; J. W. Peck, Coleman Avery, His Counsel.

Memorandum:
Rule 76 Federal Equity Rules.

I have this 15th day of February, 1934, received a copy of above Motion.

Brandon R. Millikin, Attorney for Ralph K. Beeler, Trustee.

[fols. 52-54] Petition omitted, printed side page, 1 ante.

[fol. 55] In United States Circuit Court of Appeals

Cause Argued and Submitted—June 5, 1934

Before Moorman, Simons and Allen, JJ.

This cause is argued by Brandon R. Millikin and Province M. Pogue for Appellant and by John W. Peck and Coleman Avery for Appellee and is submitted to the Court.

[fol. 56] In United States Circuit Court of Appeals

Judgment—Filed June 29, 1934

Appeal from the District Court of the United States for the Southern District of Ohio

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby set aside.

In United States Circuit Court of Appeals

Opinion—Filed June 29, 1934

Before Moorman, Simons and Allen, Circuit Judges

Simons, Circuit Judge:

The meritorious question involved in both causes is whether a levy upon real and personal property by the Sheriff of one Ohio county under a judgment of the court of another county, results in the custody of the property being acquired by the court rendering the judgment, and therefore immune to process of the bankruptcy court in proceedings begun more than four months after the entry of the judgment and the making of the execution levy. Before this can be decided, however, a number of jurisdictional questions must be determined.

[fol. 57] A. Hunter Willis on June 10, 1932, obtained a judgment against the bankrupt in the Court of Common Pleas of Hamilton County, Ohio. The bankruptcy adjudication followed on April 4, 1933. Meanwhile, and more than four months prior to adjudication, the judgment creditor obtained a writ of execution from the Hamilton County court, directed to the Sheriff of Butler County, who contemporaneously levied on both the personal property and the real estate of the bankrupt. The judgment creditor appeared specially in the bankruptcy proceedings, and moved that the trustee therein either pay the judgment with interest and costs or disclaim all right, ownership and control of the property levied upon. The Referee to whom the motion was referred entered an order granting it with respect to the personal property, but denying it with respect to the real estate. Willis petitioned the District Judge to review the Referee's order, but so far as we are advised by the record, no disposition has been made of his petition to review. Subsequently, upon motion of the trustee, a temporary injunction was issued in the bankruptcy proceedings, restraining the Sheriff from selling the property in Butler County. From this interlocutory decree appeal 6723 is taken.

The trustee being advised by one of the Judges of the District Court that there was doubt as to whether the rights of the judgment creditor could be determined in a summary proceeding since he was an adverse claimant, began a plenary action on the equity side of the District Court, presumably to determine the respective rights to the property of judgment creditor and trustee, and seeking a temporary and permanent injunction likewise to restrain the sale of the Butler County property by the Sheriff of that county. The District Court in the latter proceeding denied the injunction and dismissed the suit. While no opinion was filed, it is asserted and not denied that the ground for dismissal was the absence of diversity of citizenship. From the order in the plenary proceeding appeal 6705 is taken by the trustee.

The power of the court to adjudicate rights of adverse claimants without their consent in summary proceedings was fully considered in Harrison v. Chamberlain, 271 U. S. 191. By the opinion there it is made clear that no jurisdiction for that purpose exists if the adverse claim is real

and substantial, and not merely colorable, but resort must [fol. 58] be had by the trustee to a plenary suit. The precedents are there fully cited, and require no restatement here.

The judgment creditor's adverse claim in the instant suit depends upon the validity of the levy under Ohio law. Section 11664, General Code, provides in substance that a Writ of Execution against the property of a judgment debtor shall command the officer to seize the goods and chattels of the debtor, and for want of goods and chattels, to sell his lands and tenements for cash. Section 11666 provides as follows:

"The officer to whom a Writ of Execution is delivered shall proceed immediately to levy it upon the goods and chattels of the debtor. If no goods and chattels can be found, the officer shall endorse on the execution the words 'no goods', and forthwith levy it upon the lands and tenements of the debtor which are liable to satisfy the judgment."

Section 11656 subjects all property of a judgment debtor in the county in which the judgment is obtained to a lien, but as to all other lands and chattels the debtor is bound only from the time they are seized upon execution.

In the instant case the sheriff levied simultaneously upon all of the personal property and real estate in Butler County. It is the Trustee's contention that the levy is invalid, and that the property was therefore not within the custody of the Hamilton County court. In addition there is the contention, and if valid it must be based upon appropriate findings of fact, that there were no proceedings pending in the Common Pleas Court of Hamilton County for the sale of the real estate at the time of the filing of the bankruptcy petition, and that in order to institute such sale it is necessary to execute a præcipe for a writ of Venditioni Exponas, or order of sale. It is contended that all such writs covering the real estate in question expired before the bankruptcy proceedings were begun. There is also a question, in view of the fact that the property was encumbered by mortgages, as to whether the proper method of securing execution of a judgment was by a creditor's bill. All of these contentions are controverted by the judgment creditor, and raise issues of fact and law not so far deter-

mined. It is true that on the judgment creditor's motion for disclaimer, certain facts were found by the Referee, and [fol. 59] conclusions of law announced, but the report of the Referee, so far as we are advised, is still in suspense in the District Court. The validity of the trustee's claim, and of that made adversely, depending upon disputed facts as well as controverted issues of law, their determination involves "fair doubt and reasonable room for controversy," Harrison v. Chamberlin, supra. The adverse claim is therefore substantial, and not merely colorable, and its merits can only be adjudged in a plenary suit. It follows, therefore, that the court had no jurisdiction to issue the temporary injunction in 6723, and the order appealed from therein is reversed. There are, perhaps, other grounds for such reversal, not requiring consideration.

In 6705 there was manifestly an attempt to present to the court the issues as to the rights of the respective parties to the property in Butler County in a plenary suit begun in equity. The plaintiff's pleading therein, denominated an application, leaves much to be desired if we are to interpret it as a bill in equity, both in its statement of grounds for relief and in the kind of relief prayed for. In view, however, of the great liberality provided by the Equity Rules in respect to amendments, in view of the fact that both litigants fully understood the purpose of the proceeding and no objection being made as to the sufficiency of the pleading to state a cause of action, we are content to consider it as a plenary action in equity to determine the right of control as between the State court and the bankruptcy court, especially in view of the answer therein consenting to jurisdiction and asking that the issues be decided in the case.

We come then to the question of jurisdiction in 6705, and whether the Trustee can maintain his action in the District Court against the Sheriff of Butler County, both of them being residents of the State of Ohio. This involves consideration of Section 23 of the Bankruptcy Act, being Section 46 b, Title 11, U. S. C. A., as amended by the Act of 1926, which provides:

"Suits by the trustee shall be brought or prosecuted only in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been

instituted, unless by consent of the proposed defendant, except suits for the recovery of property, etc."

[fol. 60] The meaning of this section was very thoroughly discussed by Judge Denison in Toledo Fence & Post Company v. Lyons, 290 Fed. 637, at 644. It was in that case the view of a majority of the court that except for this section the Federal court would have jurisdiction of all suits by a Trustee to recover debts due the bankrupt, as being suits arising under the laws of the United States. Section 23 puts a limitation upon that power, but there is an exception to the limitation. The exception relates to suits against parties who voluntarily appear and submit their rights to the court in a plenary suit by the Trustee. It was thought by the court that it would be unfortunate if such submission were held to be ineffective to permit defendants to voluntarily appear and submit their rights in the endeavor common to them and the trustee to get a speedy decision of all questions by one court.

This is not to say, of course, that jurisdiction may be conferred upon Federal courts by consent, either in respect to causes which fall without the constitutional grant of power or in respect to those which, being within such grant, fall without that field of constitutional judicial power which Congress has seen fit to occupy and confer upon the Federal courts. The consent here involved is that which operates to except certain cases from the restriction imposed by Congress in the above section to the general jurisdiction which the Federal courts have of cases arising under the laws of the United States.

We come then to the question of consent in the instant case. When the trustee first filed his plenary suit the defendant sheriff moved to dissolve the restraining order and to dismiss the suit on the ground, among others, that the court was without jurisdiction to entertain it. Eleven days later, however, the sheriff filed an answer whereby he expressly withdrew the motion to dissolve the temporary restraining order and the motion to dismiss the suit, entered his general appearance, and consented that the court might hear and determine all matters referred to in the petition therein. The very next day the sheriff asked leave to withdraw the answer. What disposition was made of the last motion the record does not disclose. It is to be assumed, however, that it was not pressed, since nothing was done

until a month later, when upon a second motion to dissolve [fol. 61] and dismiss the order now appealed from was entered. We cannot doubt that under these circumstances, and under familiar rules there was that consent to the jurisdiction of the court which operates as an exception to the limitation imposed by Section 23, as interpreted in the Toledo Fence & Post case. Certainly there was deliberation rather than inadvertence in the filing of the answer, evidenced by the specific withdrawal of the first motion to dismiss, the entry of a general appearance, and the express submission of all controversy to disposition by the court.

The case not having been heard upon its merits, and the record presenting no findings of fact or conclusions of law, as required by the Equity Rules, it is manifest that, though in equity, it cannot be here determined. In re Meifert, 57 Fed. (2d) 861 (C. C. A. 6). Such findings as were made by the referee, and such legal conclusions as were announced by him in his very able and exhaustive report, were upon a motion other than that which led to the assailed order, and so far as we are advised, they have never had the consideration of the District Judge. It follows that in 6705 the cause must be reversed and remanded to the District Court with instructions to set aside the order of dismissal, hear the controversy upon its merits, make appropriate findings of fact and conclusions of law, and enter such decrees, interlocutory or final, as equity may require. Such amendments to the pleadings as may more clearly define the issues, and the general as well as the special relief prayed, may properly be submitted to the discretion of the District Judge.

The order in each case is set aside.

[fol. 62] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 63] Supreme Court of the United States

Order Allowing Certiorari—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is

granted, limited to the question of the jurisdiction of the District Court under Sec. 23 (b) of the Bankruptcy Act.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,843. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 215. John C. Schumacher, Sheriff of Butler County, Ohio, Petitioner, vs. Ralph K. Beeler, Trustee in Bankruptcy of The Long & Allstatter Company, Bankrupt. Petition for a writ of certiorari and exhibit thereto. Filed July 23, 1934. File No. 215, O. T., 1934.

SUBJECT INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI 1

A. Summary statement of the matters involved 1

B. Reasons relied upon for the allowance of the writ. 6

C. Prayer for writ 7

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.. 9

I. Opinion of the court below 9

II. Jurisdiction 9

III. Statement of the case 10

IV. Specification of errors 10

V. Argument 11

Point A. The Court of Appeals erred in reversing the judgment and order of the District Court dismissing the suit for want of jurisdiction because of lack of diversity of citizenship 11

Point B. General jurisdiction cannot be conferred by consent under paragraph b of Section 23 of the Bankruptcy Act and the Sheriff of Butler County, Ohio, could not and did not confer jurisdiction by consent on the District Court 12

Point C. The District Court had and has no right or authority to interfere with the execution of the judgment, orders and processes of the state court, which first acquired jurisdiction of the matter, and, therefore, on that ground, properly dismissed the suit for want of jurisdiction and the Circuit Court of Appeals for the Sixth Circuit erred in reversing said order of dismissal 19

CONCLUSION 21

TABLE OF CASES CITED.

PAGE

American Ass'n, Ltd. v. Hurst, et al., 59 Fed. 1 21

Antigo Screen Door Co., In re, 123 Fed. 249 19

Blair v. Brailey, 221 Fed. 1, 4 ..... 6, 17, 21

Boyle v. Gray, 28 Fed. (2d) 7, 9-11; certiorari denied, 278 U. S. 653 19

Bryan v. Speakman, 53 Fed. (2d) 463; certiorari denied, 285 U. S. 539 19

Bush v. Elliott, 202 U. S. 477, 483 ..... 6, 16

Coyle v. Duncan Spangler Coal Co., 288 Fed. 897 18

Farmers Loan & Trust Co. v. Lake St. El. R. R. Co., 177 U. S. 51 19

Harkin v. Brundage, 276 U. S. 36, 43 ..... 19, 21

Interior Construction & Improvement Co. v. Gibney, 160 U. S. 217, 219 16

Lovell v. Isidore Newman & Son, 227 U. S. 412, 426 ... 6, 16

Maier Brewing Co., Inc., In re; Simons v. Wells, 65 Fed. (2d) 673 ..... 6, 19, 20

Matthew, et al. v. Coppin, 32 Fed. (2d) 100 ..... 6, 14

Minnesota v. Northern Securities Co., 194 U. S. 48 16

Moore, In re, 209 U. S. 490 16

Morgan v. Kinney, 38 Oh. St. 610 3

Murphy, Edward 2d. v. John Hofman Co., 211 U. S. 562 ..... 19, 21

Peck v. Jenness, 7 How. 612 19

Rackmore v. New Jersey Fidelity & Plate Glass Ins. Co., 65 Fed. (2d) 341 ..... 6, 15

Schollenberger, Ex parte, 96 U. S. 369, 378 16

Southern Bank & Trust Company v. Folsom, et al., 75 Fed. 929 21

Straton v. New, 283 U. S. 318 ..... 6, 20

PAGE

Taubel, etc., Co. v. Fox, 264 U. S. 426 ..... 6, 17, 19, 21

Wabash R. R. Co. v. Adelbert College, 208 U. S. 39 .. 19, 21

Wayman v. Southard, 10 Wheat. 1, 23 19

Williams v. Neely, 134 Fed. 1 19

Wood, Trustee, etc. v. Wilbert's Sons, etc., et al., 226 U. S. 384 16

TABLE OF STATUTES CITED.

United States Code, Section 46, Title 11 ..... 7, 10

United States Code, Section 347, Title 28 10

United States Code, Section 41, Title 28 ..... 7, 10, 11, 12

General Code of Ohio, Section 11655 ..... 3, 22

General Code of Ohio, Section 11664 ..... 3, 23

General Code of Ohio, Section 11672 ..... 3, 23

General Code of Ohio, Section 11675 ..... 3, 23

General Code of Ohio, Section 11678 ..... 3, 24

General Code of Ohio, Section 11681 ..... 3, 24

General Code of Ohio, Section 11688 ..... 3, 24

APPENDICES.

Appendix A. U. S. Statutes 22

Appendix B. Ohio Statutes as to sale of real estate on execution 22

IN THE

Supreme Court of the United States

October Term, 1934.

JOHN C. SCHUMACHER, Sheriff of Butler County, Ohio,

Petitioner and Appellee Below,

v.

RALPH K. BEELER, Trustee in Bankruptcy of The Long & Allstatter Company, Bankrupt,

Respondent and Appellant Below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice and Justices of the Supreme Court of the United States:

Your petitioner, John C. Schumacher, Sheriff of Butler County, Ohio, respectfully shows to this honorable court:

A.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The question as to the jurisdiction of the United States District Courts is presented by this petition. That question is whether under Sec. 23b of the Bankruptcy Act, in the absence of diversity of citizenship, the defendant can con-

sent to jurisdiction or can confer jurisdiction by consent; in other words, whether that section deals with jurisdiction or venue. Upon this subject the lower federal courts are in conflict.

The proceeding in this case was an alleged plenary suit in equity filed in the United States District Court for the Southern District of Ohio, Western Division, on August 26, 1933, by Ralph K. Beeler, Trustee in Bankruptcy of The Long & Allstatter Company of the City of Hamilton, Butler County, Ohio, a corporation under the laws of Ohio, a bankrupt on and under its voluntary petition filed in cause No. 10326 on the Bankruptcy docket of said District Court, on April 4, 1933, and the immediate adjudication of it as such by the court on said day, to enjoin John C. Schumacher, Sheriff of said Butler County, Ohio, and a resident of Hamilton, Ohio, the defendant designated in the caption of said alleged bill in equity, which was labelled as an "Application" (R. 1), from proceeding with, causing or permitting the sale of any property of the bankrupt as set forth in Exhibit 1 attached to said "Application," (R. 3-33), on August 28, 1933, or any other day.

The property set forth in said Exhibit 1 (R. 3-33) had been levied upon by said Sheriff of Butler County, Ohio, on June 16, 1932, under a writ of execution issued by the Court of Common Pleas of Hamilton County, Ohio, upon a judgment rendered by that court on June 10, 1932, in an action in said court, in favor of A. Hunter Willis against The Long & Allstatter Company, a corporation under the laws of Ohio, for $107,243.36, which said judgment had, prior to said April 4, 1933, been affirmed by the court of last resort in Ohio.

After the return of the first writ of execution on August 8, 1932, reciting the levy, but without any sale, orders of sale (*venditioni exponas*) were issued every 60 days, under and in accordance with the Statutes of Ohio, commanding

said Sheriff to forthwith sell, or cause to be sold, the property levied upon. Under the Statutes of Ohio, the Sheriff may sell real property as well as personal property under a writ of execution and orders of sale thereon, without any other proceeding. Secs. 11655, 11664, 11672, 11675, 11678, 11681, 11688 General Code of Ohio; *Morgan* v. *Kinney*, 38 Ohio State Rep. 610.

On August 30, 1933, said Sheriff filed a motion to dismiss said plenary suit, No. 866 on the Equity Docket of said District Court, on several grounds stated in said motion, the first of which was that the court was without jurisdiction to entertain a suit in equity in the matter against the designated defendant (R. 19).

On September 11, 1933, said Sheriff filed an answer in said cause No. 866 in which he purported to withdraw his motion to dismiss the cause and to enter his appearance and to consent that the court might hear and determine all matters referred to in the petition (R. 33-35).

On the next day, September 12, however, said Sheriff filed a motion for leave to withdraw said answer (R. 35).

On November 6, 1933, the District Court entered an order, temporarily restraining and enjoining said Sheriff of Butler County, Ohio, for a period of ten days from said date, from proceeding with or permitting the sale of any of the property of said bankrupt set forth in Exhibit 1, attached to said petition (R. 35, 36).

On November 10, 1933, said Sheriff of Butler County, Ohio, again filed a motion to dismiss said suit on the same grounds, of which the first one was that the court was without jurisdiction to entertain a suit in equity in the matter against the designated defendant (R. 37, 38).

On November 16, 1933, said District Court granted said motion of said Sheriff, filed as aforesaid on November 10, 1933, and dismissed said alleged suit. As stated, one of the grounds of the motion was that the court was without jurisdiction to entertain a suit in equity in the matter against

the designated defendant, for the reason that there was no diversity of citizenship.

On appeal to the United States Circuit Court of Appeals for the Sixth Circuit, that court reversed the order of the District Court, dismissing said suit (R. 56).

The Circuit Court of Appeals held that under Sec. 24 of the Judicial Code, as amended (Feb. 28, Sec. 41, U. S. C. A.) and by virtue of the answer filed by the sheriff, the District Court had jurisdiction "by consent of the proposed defendant" under Sec. 23b of the Bankruptcy Act (Tit. 11, Sec. 46[b], U. S. C. A.).

The following excerpts from the opinion plainly indicate the point upon which the Court of Appeals predicated its decision.

> Simons, Circuit Judge. "We come then to the question of jurisdiction in 6705, and whether the Trustee can maintain his action in the District Court against the Sheriff of Butler County, both of them being residents of the State of Ohio. This involves consideration of Section 23 of the Bankruptcy Act, being Section 46b, Title 11, U. S. C. A., as amended by the Act of 1926, which provides:
>
> > 'Suits by the trustee shall be brought or prosecuted only in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property, etc.'
>
> "The meaning of this section was very thoroughly discussed by Judge Denison in *Toledo Fence & Post Company* v. *Lyons,* 290 Fed. 637, at 644. It was in that case the view of a majority of the court that except for this section the Federal court would have jurisdiction of all suits by a trustee to recover debts due the bankrupt, as being suits arising under the laws of the United States. Section 23 puts a limitation upon that power, but there is an exception to the limitation.

The exception relates to suits against parties who voluntarily appear and submit their rights to the court in a plenary suit by the Trustee. It was thought by the court that it would be unfortunate if such submission were held to be ineffective to permit defendants to voluntarily appear and submit their rights in the endeavor common to them and the trustee to get a speedy decision of all questions by one court (R. 59, 60.)

* * * * * * * * *

"We come then to the question of consent in the instant case. When the trustee first filed his plenary suit the defendant sheriff moved to dissolve the restraining order and to dismiss the suit on the ground, among others, that the court was without jurisdiction to entertain it. Eleven days later, however, the sheriff filed an answer whereby he expressly withdrew the motion to dissolve the temporary restraining order and the motion to dismiss the suit, entered his general appearance, and consented that the court might hear and determine all matters referred to in the petition therein. The very next day the sheriff asked leave to withdraw the answer. What disposition was made of the last motion the record does not disclose. It is to be assumed, however, that it was not pressed, since nothing was done until a month later, when upon a second motion to dissolve and dismiss, the order now appealed from was entered. We cannot doubt that under these circumstances, and under familiar rules, there was that consent to the jurisdiction of the court which operates as an exception to the limitation imposed by Section 23, as interpreted in the *Toledo Fence & Post* case. Certainly there was deliberation rather than inadvertence in the filing of the answer, evidenced by the specific withdrawal of the first motion to dismiss, the entry of a general appearance, and the express submission of all controversy to disposition by the court." (R. 60, 61.)

* * * * * * * * *

"It follows that in 6705 the cause must be reversed and remanded to the District Court with instructions

to set aside the order of dismissal, hear the controversy upon its merits, make appropriate findings of fact and conclusions of law, and enter such decrees, interlocutory or final, as equity may require." (R. 61.)

B.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case is in conflict with the decisions of the Circuit Court of Appeals for the Ninth, Second, and Fifth Circuits in the following cases:

Matthew, et al., v. *Coppin*, 32 Fed. (2d) 100 (1929), (C. C. A. 9th Cir.).
Rackmore v. *New Jersey Fidelity & Plate Glass Ins. Co.*, 65 Fed. (2d) 341 (1933), (C. C. A. 2nd Cir.).
Blair v. *Brailey*, 221 Fed. 1 (1915), (C. C. A. 5th Cir.).
In re Maier Brewing Co., Inc.; Simons v. *Wells*, 65 Fed. (2d) 673 (1933), (C. C. A. 9th Cir.).

2. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case is an erroneous decision of an important question of general law and is in conflict with the weight of authority.

3. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case involves an important question of Federal law which has not been, but should be, settled by this court.

4. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case is a decision of a federal question in a way probably in conflict with applicable decisions of this court, to-wit the cases of:

Lovell v. *Isidore Newman & Son*, 227 U. S. 412, 426 (1913).
Bush v. *Elliott*, 202 U. S. 477, 483 (1906).
Taubel, etc., Co. v. *Fox*, 264 U. S. 426 (1924).
Straton v. *New*, 283 U. S. 318 (1930).

5. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case so far departs from the accepted and usual course of judicial proceedings, or so far sanctions such departure by the lower court, as to call for an exercise of this court's power of supervision.

6. The Court of Appeals erred in holding that general jurisdiction can be conferred by consent under the provisions of Sec. 23b of the Bankruptcy Act (Tit. 11, Sec. 46b, U. S. C. A.).

7. The Court of Appeals erred in holding that the county sheriff in the instant case, to whom, and as an officer of such State Court, a writ of execution and order of sale had issued out of the Court of Common Pleas of Hamilton County, Ohio, upon a judgment rendered by that court more than nine months before the filing of the voluntary petition in bankruptcy, under which a levy had been made by said Sheriff more than nine months preceding the bankruptcy, could by consent oust the jurisdiction of the State court and confer a general jurisdiction on the United States District Court sitting in equity, under the provisions of Sec. 23 of the Bankruptcy Act. (Tit. 11, Sec. 46, U. S. C. A.), and Sec. 24 of the Judicial Code, as amended (Tit. 28, Sec. 41, Par. 1, U. S. C. A.).

Your petitioner presents herewith as part of this petition a certified copy of the transcript of the record, including all proceedings in said cause in the District Court and in the said Circuit Court of Appeals.

C.

PRAYER FOR WRIT.

Wherefore, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court on a day certain to be

therein designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in said case on its docket and entitled: "No. 6705, *Ralph K. Beeler, Trustee in Bankruptcy of The Long & Allstatter Company, Bankrupt, Appellant,* v. *John C. Schumacher, Sheriff of Butler County, Ohio, Appellee,*" to the end that said case may be reviewed and determined by this court as provided by the United States Statutes and that the judgment herein of said United States Circuit Court of Appeals be reversed by the court and for such further relief as to this court may seem proper.

JOHN C. SCHUMACHER,
Sheriff of Butler County, Ohio,
Petitioner,

By FRANK H. SHAFFER, JR.,
Attorney for Petitioner.

PAUL A. BADEN,
Prosecuting Attorney of Butler County,

JOHN W. PECK,
COLEMAN AVERY,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1934.

JOHN C. SCHUMACHER, Sheriff of Butler County, Ohio,

Petitioner and Appellee Below,

v.

RALPH K. BEELER, Trustee in Bankruptcy of The Long & Allstatter Company, Bankrupt,

Respondent and Appellant Below.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Sixth Circuit was filed June 29, 1934 (R. 56-61). (Unreported.)

The order of the District Court was entered November 16, 1933 (R. 39, 40).

II.

JURISDICTION.

It is claimed that this court has jurisdiction of this case under Section 240 of the Judicial Code, as amended by the

act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (Tit. 28, Sec. 347, U. S. C. A.).

The case involves the construction and interpretation of Sec. 23 of the Bankruptcy Act (Tit. 11, Sec. 46, U. S. C. A.) in conjunction with Sec. 24 of the Judicial Code (Tit. 28, Sec. 41, Par. 1, U. S. C. A.).

The date of the judgment to be reviewed is June 29, 1934 (R. 56).

III.

STATEMENT OF THE CASE.

The general nature of the case has been stated in the petition under "A" (pp. 1-5) which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

Petitioner respectfully submits:

(1) That the Court of Appeals erred in holding that general jurisdiction can be conferred by consent under the provisions of Sec. 23b of the Bankruptcy Act (Tit. 11, Sec. 46b, U. S. C. A.).

(2) That the Court of Appeals erred in holding that the county sheriff in the instant case, to whom, and as an officer of such State Court, a writ of execution and order of sale had issued out of the Court of Common Pleas of Hamilton County, Ohio, upon a judgment rendered by that court more than nine months before the filing of the voluntary petition in bankruptcy, under which a levy had been made by said Sheriff more than nine months preceding the bankruptcy, could or did, under the proceedings as shown in the record, oust the jurisdiction of the State court and confer a general jurisdiction on the United States District Court sitting in equity, under the provisions of Sec. 23 of the Bankruptcy Act (Tit. 11, Sec. 46, U. S. C. A.) and Sec.

24 of the Judicial Code, as amended (Tit. 28, Sec. 41, Par. 1, U. S. C. A.).

The questions involved thereunder are:

Whether general jurisdiction may be conferred by consent under the provisions of Sec. 23b of the Bankruptcy Act. (Tit. 11, Sec. 46[b], U. S. C. A.), and whether a sheriff of a county in Ohio, to whom, as an officer of a court of the State of Ohio, a writ of execution and orders of sale had been issued by said state court, in accordance with the execution statutes of Ohio, upon a judgment rendered by said state court more than four months before the bankruptcy, under which a levy had been made by said sheriff, also more than four months preceding bankruptcy, could or did, under the proceedings as shown in the record, oust the jurisdiction of the state court and confer general jurisdiction on the United States District Court sitting in equity.

We submit that the Court of Appeals erred in deciding all of these questions in the affirmative.

V.

ARGUMENT.

Point A.

The Court of Appeals Erred in Reversing the Judgment and Order of the District Court Dismissing the Suit for Want of Jurisdiction Because of Lack of Diversity of Citizenship.

The alleged bill in equity (R. 1-3) averred that the plaintiff is the duly appointed, qualified and acting Trustee in Bankruptcy of The Long & Allstatter Company of Hamilton, Ohio, Bankrupt. The alleged bill further admitted and averred that John C. Schumacher is the Sheriff of Butler County, Ohio, and as such, under process issued by the Court of Common Pleas of Hamilton County, Ohio, in cause

No. A-30454 on the docket of said court, had levied on certain property of The Long & Allstatter Company at Hamilton, Ohio, and was about to sell same under the orders of sale issued by said Court. The alleged bill, therefore, failed to show on its face jurisdiction in the court below for the reason that there was no diversity of citizenship under section 24 of the Judicial Code, as amended (Tit. 28, Sec. 41, par. 1, U. S. C. A.).

As the suit did not, of course, fall within the exceptions stated in Sec. 23b of the Bankruptcy Act, which relate to fraudulent transfers and preferences, which we have italicized in our quotation below of that statute, the District Court had no jurisdiction of the matter and properly dismissed the suit for want of jurisdiction and the Court of Appeals erred in reversing said judgment and order, unless general jurisdiction may be conferred by consent under the provisions of Sec. 23b of the Bankruptcy Act (Tit. 11, Sec. 46[b], U. S. C. A.).

Point B.

General Jurisdiction Cannot Be Conferred by Consent Under Paragraph b of Section 23 of the Bankruptcy Act and the Sheriff of Butler County, Ohio, Could Not and Did Not Confer Jurisdiction by Consent on the District Court.

Section 23 of the Bankruptcy Act, as amended May 27, 1926; c. 406, Sec. 8, 44 Stat. 664 (Tit. 11, Sec. 46, U. S. C. A.), provides:

> "*Jurisdiction; United States and State Courts.*
>
> (a) The United States District Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as

though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

(b) "Suits by the Trustee shall be brought or prosecuted only in the courts where the bankrupt, whose estate is being administered by such Trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, *except suits for the recovery of property under Section 96, subdivision b, of this title; Section 107, subdivision e, of this title; and Section 110, subdivision e, of this title.* (July 1, 1898, c. 541, Sec. 23, 30 Stat. 552; Feb. 5, 1903, c. 487, Sec. 8, 32 Stat. 798; June 25, 1919, c. 412, Sec. 7, 36 Stat. 840.)"

It will be seen, therefore, that this case involves the interpretation and construction of paragraph b of this section and the meaning of the words therein *"unless by consent of the proposed defendant."*

The decision in the instant case, predicated upon the *obiter dicta* of Judge Denison in a previous case decided by the same, the Circuit Court of Appeals for the Sixth Circuit, to-wit: the case of *Toledo Fence & Post Company* v. *Lyons,* 290 Fed. 637 (1929), that the consent of the Sheriff under the circumstances as shown in the record, could confer jurisdiction, is contrary to the decisions of the Circuit Court of Appeals for other circuits, as we have stated and shown in the petition herein.

We submit that general jurisdiction cannot be conferred by consent on the district courts and that paragraph b of Section 23 of the Bankruptcy Act does not mean or intend to authorize the conferring of general jurisdiction by consent and that the clause *"unless by consent of the proposed defendant"* relates to the matter of venue only.

Cases in other circuits, which so hold, are:

Matthew, et al., v. *Coppin*, 32 Fed. (2d) 100 (1929), (C. C. A. 9th Cir.).

"Appeal from the District Court of the United States for the Southern Division of the Northern District of California.

"Suit by George W. Coppin, as trustee in bankruptcy of the Flintex Corporation, against Andrew T. Matthew, as administrator of the Estate of Ralph L. Clements, deceased, and another."

Rudkin, J. "(1-3) The first assignment of error challenges the jurisdiction of the court below, and in this connection the radical difference between the two causes of action becomes important. Section 23b of the Bankruptcy Act, as amended (11 U. S. C. A., Sec. 46), provides that suits by a trustee shall be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 60, subd. b (11 U. S. C. A., Sec. 96), section 67, subd. e (11 U. S. C. A., Sec. 107), and section 70, subd. e (11 U. S. C. A., Sec. 110). The three exceptions referred to are suits for the recovery of preferences given by the bankrupt within four months before the filing of the petition in bankruptcy, suits to set aside conveyances or transfers made by the bankrupt within four months prior to the filing of the petition, and suits to avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided. Unless a case falls within one of these three exceptions, a suit of this kind cannot be prosecuted in a federal court, unless there is the requisite diversity of citizenship between the bankrupt and the defendants. *True, the statute says unless by the consent of the proposed defendant, but the consent referred to is a consent to the local jurisdiction only, as where a defendant in any other action*

in the federal court is sued in the wrong district. Lovell v. *Isidore Newman & Sons,* 227 U. S. 412-420, 33 S. Ct. 375, 57 L. Ed. 577; *McEldowney* v. *Card* (C. C.), 193 F. 475; *Operator's Piano Company* v. *First Wisconsin Trust Company* (C. C. A.), 283 F. 904; *Coyle* v. *Duncan Spangler Coal Co.* (D. C.), 288 F. 897. *A defendant cannot confer jurisdiction upon a federal court by consent, unless jurisdiction is conferred by the general law''* (p. 101).

• • • • • • • • •

"In view of the fact that the objection to the jurisdiction was not raised below, no costs will be allowed in this court" (p. 102).

Rackmore v. *New Jersey Fidelity & Plate Glass Ins. Co., et al.,* 65 Fed. (2d) 341 (1933), (C. C. A. 2nd Cir.).

"Appeal from the District Court of the United States for the Southern District of New York.

"Suit by Max Rackmore, as trustee in bankruptcy of the M. C. T. Company, Inc., against the New Jersey Fidelity & Plate Glass Insurance Company and another. From a decree dismissing the bill of complaint on defendants' motion for want of jurisdiction because of lack of diversity of citizenship, complainant appeals. Affirmed."

Augustus N. Hand, J. "(3) Section 23b of the Bankruptcy Act (11 U. S. C. A., Sec. 46b), provides that suits between a trustee in bankruptcy and adverse claimants concerning property claimed by the trustee can be maintained only 'in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings . . . had not been instituted.' "

After referring to the exceptions stated in the statute referring to fraudulent conveyances and preferences, Judge Hand continues:

"The present suit is not one belonging to any of those classes. It therefore can be maintained in a

federal court only if the bankrupt might have brought it there. It must fail because M. C. T. Co., Inc., and the defendant Alpha are each New York corporations, so that diversity of citizenship is lacking. Such diversity is necessary to support federal jurisdiction and, without it, the trustee must proceed in the State Court" (p. 343).

Applicable decisions of this court on the matter are:

Lovell v. *Isidore Newman & Son,* 227 U. S. 412, 426;
Bush v. *Elliott,* 202 U. S. 477, 483;
Minnesota v. *Northern Securities Co.,* 194 U. S. 48 (1904);
Wood, Trustee, etc., v. *Wilbert's Sons, etc., et al.,* 226 U. S. 384 (1912);
In re Moore, 209 U. S. 490 (1908);
Interior Construction & Improvement Co. v. *Gibney,* 160 U. S. 217, 219 (1895);
Ex parte Schollenberger, 96 U. S. 369, 378 (1877)

In *Lovell* v. *Newman, supra,* this court said:

> Mr. Justice Day. "Furthermore the consent provided for in Sec. 23b certainly was not intended to enlarge the jurisdiction of the Circuit Courts of the United States so as to give them a jurisdiction which they would not have because of diverse citizenship and a requisite amount in controversy or by reason of a cause of action arising under the Constitution or laws of the United States" (p. 426).

Whether he did so willingly or unwillingly and under compulsion and duress, the Sheriff, as an officer of the State Court and required by law to execute the processes of the State Court, in behalf of the judgment creditor in the State Court, had no right or authority to oust the jurisdiction of the State Court and prejudice the rights of the judgment creditor in the State Court, by filing an answer consenting that the Federal Court take jurisdiction, after he

had theretofore raised the question of want of jurisdiction, by a motion to dismiss.

Blair v. *Brailey,* 221 Fed. 1 (1915), (C. C. A. 5th Cir.).

Walker, J. "When a court having jurisdiction of the parties and the subject-matter has taken property into its possession such property is thereby withdrawn from the jurisdiction of all other courts and the court so in possession has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property, though that court is not one of bankruptcy, and though the property so in its possession is part of the estate of one who was adjudged a bankrupt on a petition filed in a court of bankruptcy after the first-mentioned court's possession was acquired. *Murphy* v. *John Hofman Co.,* 211 U. S. 562; *Wabash Railroad* v. *Adelbert College,* 208 U. S. 38; *In re Antigo Screen Door Co.,* 123 Fed. 249. It follows that the questions as to the possession of property which were presented by the petition filed in the Georgia court by the trustee in bankruptcy were for the determination of that court alone, unless in some way it had surrendered its right to decide those questions and remitted the decision of them to some other tribunal. *Plainly the receivers, having the property in charge as mere agents of the court which appointed them, unless such power was conferred upon them by that court, were without power to do anything having the effect of ousting that court's jurisdiction over the property intrusted to their custody or of subjecting that property to the power or jurisdiction of another court. Whitney* v. *Wenman,* 198 U. S. 539" (p. 4).

Taubel, etc., Co., Inc., v. *Fox,* 264 U. S. 426 (1924).

Mr. Justice Brandeis. "*In this case, since the possession of the sheriff was the possession of the state court, the trustees' claim to the property would, under*

general principles of law, have to be litigated in the state court" (p. 430).

In *Coyle* v. *Duncan Spangler Coal Co.*, 288 Fed. 897 (1923), the court said:

McKeehan, J. "I think that the words 'unless by consent of the proposed defendant,' as used in section 23b, refer to cases that are within the general jurisdiction of the federal courts, albeit *not* within the jurisdiction of the particular court in which the suit is brought, and that they are not to be regarded as an attempt by Congress to grant to private litigants the power to confer upon the federal courts a jurisdiction which they would not otherwise possess.

"This question was considered by Mr. Justice Sanford in an instructive opinion in McEldowney v. *Card (D. C.), 193 Fed. 475, delivered when he was judge of the United States District Court for the Eastern District of Tennessee. He there construed section 23b as constituting merely a limitation upon the local jurisdiction of the particular court in which the suit is brought and therefore is one that may be waived by the defendant.* (p. 901).

"It seems to me that the words 'unless by consent of the proposed defendant,' as used in section 23b, should be construed in the light of the evident purpose of the first paragraph of the section, and in the light of the well-recognized distinction between what may be termed the general jurisdiction of the federal courts as distinguished from the local jurisdiction of a particular federal court, and *I am therefore of opinion that, irrespective of the defendant's consent, diversity of citizenship and the requisite jurisdictional amount are necessary to this court's jurisdiction over such a suit as this"* (p. 902).

Point C.

The District Court Had and Has No Right or Authority to Interfere with the Execution of the Judgment, Orders and Processes of the State Court, Which First Acquired Jurisdiction of the Matter, and, Therefore, on That Ground Properly Dismissed the Suit for Want of Jurisdiction and the Circuit Court of Appeals for the Sixth Circuit Erred in Reversing Said Order of Dismissal.

The Court of Common Pleas of Hamilton County, Ohio, had and has exclusive and continuing jurisdiction over and control of the property of The Long & Allstatter Company, levied upon by the Sheriff of Butler County, Ohio, on June 16, 1932, and the sole right and duty to determine questions arising on and under the execution of its said orders and processes, and, therefore, the District Court of the United States had and has no right to interfere with that jurisdiction.

Peck v. *Jenness,* 7 How. 612 (1849).
Farmers Loan & Trust Co. v. *Lake St. El. R. R. Co.,* 177 U. S. 51 (1900).
Wabash R. R. Co. v. *Adelbert College,* 208 U. S. 39 (1908).
Edward Murphy 2d. v. *John Hofman Co.,* 211 U. S. 562 (1909).
Taubel, etc., Co. v. *Fox,* 264 U. S. 426 (1924).
Harkin v. *Brundage,* 276 U. S. 36, 43 (1927).
In re Antigo Screen Door Co., 123 Fed. 249 (1903).
Williams v. *Neely,* 134 Fed. 1 (1904).
Bryan v. *Speakman,* 53 Fed. (2d) 463 (1931); certiorari denied, 285 U. S. 539.
In re Maier Brewing Co., Inc.; Simons v. *Wells,* 65 F. (2d) 673 (1933), (C. C. A. 9th Cir.).
Wayman v. *Southard,* 10 Wheat. 1, 23 (1825).
Boyle v. *Gray,* 28 Fed. (2d) 7, 9, 10 and 11 (1928); certiorari denied, 278 U. S. 653.

A forceful statement of the rule is found in *Maier Brewing Co., Inc.; Simons* v. *Wells* (C. C. A. 9th Cir.), supra, viz:

> Mack, J.: "In bankruptcy, as in equity, 'one court will not snatch a res from another's mouth,' *In re Greenlie-Halliday Co., supra.*"

The action of the District Court dismissing the suit is fully and completely sustained and required by the case decided by this court, which is the last word on the subject, to-wit:

Straton v. *New*, 283 U. S. 318.

In that case, Mr. Justice Roberts, after referring to the cases of *Metcalf* v. *Barker*, 187 U. S. 165; *Clarke* v. *Larremore*, 188 U. S. 486; and *Globe Bank* v. *Martin*, 236 U. S. 288, said:

> Mr. Justice Roberts: "Following these cases the Federal courts have with practical unanimity held that where a judgment which constitutes a lien on the debtor's real estate is recovered more than four months prior to the filing of the petition, the bankruptcy court is without jurisdiction to enjoin the prosecution of the creditor's action, instituted prior to the filing of a petition in bankruptcy, to bring about a judicial sale of the real estate. (Note No. 6.)
>
> "The trustee in bankruptcy may intervene in such suits to protect the interests of the estate. (Note No. 7.)
>
> "*It is clear that if the action in the State court was merely in the nature of an execution or proceeding to obtain the avails of the judgment lien it should not have been enjoined by the District Court.*" (pp. 326, 327).

The legality of the levy, if any question could be raised thereon, was a matter to be presented to and determined by the state court and that court alone.

Wabash R. R. Co. v. *Adelbert College,* 208 U. S. 39 (1908).
Edward Murphy 2d. v. *John Hofman Co.,* 211 U. S. 562 (1909).
Taubel, etc., Co. v. *Fox,* 264 U. S. 426 (1924).
Harkin v. *Brundage,* 276 U. S. 36, 43 (1927).
Blair v. *Brailey,* 221 Fed. 1 (1915), (C. C. A. 5th Cir.).

See also opinions of Mr. Chief Justice Taft and Mr. Justice Lurton when on the Court of Appeals for the Sixth Circuit, in the following cases:

American Ass'n Ltd. v. *Hurst, et al.,* 59 Fed. 1 (1893).
Southern Bank & Trust Company v. *Folsom, et al.,* 75 Fed. 929 (1896).

CONCLUSION.

That the question at issue is important, and that it arises under Federal law, and that it is one that should be settled, are, we think, self-evident propositions.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision of the Court of Appeals of the Sixth Circuit.

Respectfully submitted,

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July 19, 1934.

APPENDIX A.

Statutes of the United States.

Section 24 of the Judicial Code, as amended, (Tit. 28, Sec. 41, par. 1, U. S. C. A.).

"The district courts shall have original jurisdiction as follows:

"(1) *United States as plaintiff; civil suits at common law or in equity.*—First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. (R. S. Secs. 563, 629; Mar. 3, 1875, c. 137, Sec. 1, 18 Stat. 470; Mar. 3, 1887, c. 373, Sec. 1, 24 Stat. 552; Aug. 13, 1888, c. 866, Sec. 1, 25 Stat. 433; Mar. 3, 1911, c. 231, Sec. 24, 36 Stat. 1091.)"

APPENDIX B.

Ohio Statutes.

General Code, Sec. 11655. *What subject to levy and sale.* Lands and tenements, including vested legal interests

therein, permanent leasehold estates renewable forever, and goods and chattels, not exempt by law, shall be subject to the payment of debts, and liable to be taken on execution and sold as hereinafter provided.

General Code, Sec. 11664. *Writ of execution.* The writ of execution against the property of a judgment debtor, issuing from a court of record, shall command the officer to whom it is directed, that of the goods and chattels of the debtor he cause to be made the money specified in the writ, and for want of goods and chattels, he cause his lands and tenements to be sold for cash. If the court rendering the judgment or decree so orders, real estate may be sold under execution as follows: one-third cash on the day of sale, one-third in one year, one-third in two years thereafter, with interest on deferred payments, to be secured by mortgage on the premises so sold. An execution on a judgment rendered against a partnership firm by its firm name shall operate only on the partnership property. The exact amount of the debt, damages and costs, for which the judgment is entered, shall be indorsed on the execution. (R. S. Sec. 5381.)

General Code, Sec. 11672. *Lands to be appraised.* When execution is levied upon lands and tenements, the officer who makes the levy shall call an inquest of three disinterested freeholders, residents of the county where the lands taken in execution are situated, and administer to them an oath impartially to appraise the property so levied upon, upon actual view. They forthwith shall return to such officer, under their hands, an estimate of the real value of the property in money. (R. S. Sec. 5389.)

General Code, Sec. 11675. *Land not to be sold for less than two-thirds appraised value.* No tract of land shall be sold for less than two-thirds of the value returned in the inquest; except that in all cases where a junior mortgage or other junior lien is sought to be enforced against real estate by an order, judgment or decree of court, subject to a prior lien or liens thereon, and such prior lien or liens, and the claims or obligations secured thereby, are unaffected by such order, judgment or decree, the court making such

order, judgment or decree, may determine the minimum amount for which such real estate may be sold, such minimum amount, however, to be not less than two-thirds of the difference between the value of the real estate appraised as provided in section eleven thousand six hundred and seventy-two, and the amount remaining unpaid on the claims or obligations secured by such prior lien or liens. (R. S. Sec. 5391.)

General Code, Sec. 11678. *Notices of sale of lands.* All notices and advertisements for the sale of lands and tenements located in a city or village in this state, made by virtue of proceedings in a court of record therein, in addition to a description of such lands and tenements, shall contain the street number of the building or buildings erected on the lands, or the street number of the lots offered for sale. If no such number exists, then the notice or advertisement must contain the name of the street or road upon which such lands and tenements are located, together with the names of the streets or roads immediately north and south or east and west of such lands and tenements, that cross or intersect the street or road upon which they are located. (93 v. 256, Sec. 1.)

General Code, Sec. 11681. *Notice of time and place of sale.* Lands and tenements taken in execution shall not be sold until the officer causes public notice to be given of the time and place of sale, for at least thirty days before the day of sale, by advertisement in a newspaper printed and of general circulation in the county. (R. S. Sec. 5393.)

General Code, Sec. 11688. *Confirmation and order for deed.* Upon the return of any writ of execution for the satisfaction of which lands and tenements have been sold, on careful examination of the proceedings of the officer, if the court finds that the sale was made, in all respects, in conformity to the provisions of this title, it shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and that the officer make to the purchaser a deed for the lands and tenements. (R. S. Sec. 5398.)

FILE COPY

SEP

Supreme Court of the United States

OCTOBER TERM 1934,

No. 215.

JOHN C. SCHUMACHER, Sheriff of Butler County, Ohio,
Petitioner,

vs.

RALPH K. BEELER, Trustee in Bankruptcy of The Long & Allstatter Company, Bankrupt,
Respondent.

BRIEF FOR RESPONDENT

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INDEX

	Page
Statement	1
The Record	3
Argument	3
I. District Court Acquired Jurisdiction by Consent	4
II. District Court Acquired Jurisdiction Because it had Possession of the Res	8
(a) Bankruptcy Law gave Trustee in Bankruptcy Possession	11
(b) Bill Alleges Trustee in Possession	11
(c) Sheriff Not in Possession Under law of Ohio	11
III. Hamilton County Common Pleas Court did not have Jurisdiction	14
(a) The Real Estate is located in Butler County outside its Jurisdiction	14
(b) The Execution is Void	15
(c) No Proceedings Pending in Hamilton County Court to Enforce Lien	16
(d) Execution at law on Mortgaged Property Impractical Under Ohio Statutes	17
Conclusion	19

TABLE OF CASES

	Page
Acme Harvester Co. v. Beekman, 222 U. S., 300	11
Bisbee v. Hall, 3 Ohio, 449	13
Fowble v. Raybieg, 4 Ohio, at p. 56	10
Herbert v. Crawford, 228 U. S., 204	10
Hill v. Wallace, 259 U. S., 44	11
Isaacs v. Hobbs, 282 U. S., 733	9
Massachusetts Bonding Co. v. Bridge, 37 F. (2d) 701	8
Merwine on Judicial Conveyances, pp. 70 and 106	17
Moore v. Rittenhouse, 15 O. S., 310	17
Mueller v. Nugent, 184 U. S., 1	11
Murphy v. Hoffman Co., 211 U. S., 562	8
Ohio General Code, Section 11268	14
" " " " 11269	14
" " " " 11270	15
" " " " 11656	12
" " " " 11664	15
" " " " 11666	16
" " " " 11672	17
" " " " 11675	17
Ohio Jurisprudence, Vol. 17, Sec. 152, p. 815	13
" " " 17, " 263,	17
" " " 17, " 310,	17
Payne v. Central R. R., 255 U. S., 228	11
Reynolds v. Rogers, 5 Ohio, 169	13
Straton v. New, 283 U. S., 318	11
Taubel v. Fox, 264 U. S., 426	10
Toledo Fence & Post Co. v. Lyons, 290 Fed., 637	5
U. S. Code, Sec. 46(b), Title 11	4
U. S. Constitution, Art. 3, Sec. 2	5
White v. Schloerb, 178 U. S., 542	10
Whitney v. Wenman, 198 U. S., 539	10

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Respondent.

BRIEF FOR RESPONDENT.

Statement.

For a clearer understanding of this proceeding, the following history is submitted:

August 25, 1933, Ralph K. Beeler, Trustee in Bankruptcy of The Long & Allstatter Company applied in bankruptcy cause number 10326 in the District Court, for a summary order preventing John C. Schumacher, Sheriff of *Butler* County, Ohio, from selling certain property of the bankrupt, under an alleged order of execution from the Common Pleas Court of *Hamilton* County, Ohio.

District Judge Hough, sitting in the absence of District Judge Nevin, refused to issue the injunction in the *summary proceedings* in bankruptcy, but stated he would issue it if application were made in a separate, *plenary*

action. Therefore, on August 26, 1933, this plenary action was commenced under District Court Number 866 in Equity.

On the return of District Judge Nevin to the District, he disagreed with District Judge Hough as to the form of the action in which the injunction should issue and thereupon dissolved the injunction and dismissed the bill of complaint in this *plenary* action; but he issued a similar injunction in the *summary* application under Bankruptcy Docket Number 10326, (wherein Judge Hough had refused it, as above stated).

The Trustee appealed from District Judge Nevin's order dissolving the injunction and dismissing the *plenary* suit, District Court Number 866, and this appeal is number 6705 in the Court of Appeals. A. Hunter Willis, the judgment creditor, appealed from the order granting the injunction in the *summary* action, (District Court Number 10326,) and his appeal was given number 6723 in the Court of Appeals.

The two cases were heard together in the Court of Appeals and this explains the reference to both cases in the opinion of the Court (R. pages 56 to 61).

The Court of Appeals reversed the District Court in each case holding that while the District Court had jurisdiction it must exercise that jurisdiction in the *plenary* action and not in the *summary* action. Counsel for Willis filed this petition for a writ of certiorari bringing up the plenary action. The summary action is still pending in the Court of Appeals on a motion for rehearing filed by the Trustee.

The Trustee submits that the action of the Court of Appeals in this case was correct and the petition for a writ of certiorari should be denied.

The Record.

After the filing of the bill and upon notice to the Sheriff, (R. 17), the District Court (District Judge Hough sitting) issued a temporary injunction restraining the Sheriff from selling the bankrupt's property (R. 18). August 30, 1933, the Sheriff filed a motion to dissolve the injunction and to dismiss the bill (R. 19), but before this was heard he withdrew the motion on September 11, 1933 (R. 33) and the Sheriff then filed an answer on said September 11, 1933 (R. 33) in which he entered his appearance and consented to the court hearing the case, determining the matters involved, and asked the court to instruct him, (the Sheriff), as to his rights (R. 34).

On September 12, 1933 (R. 35), the Sheriff moved the court for leave to withdraw the answer, but this request was never pressed nor acted upon. Two months later, on November 10, 1933, (R. 37), the Sheriff again moved to dissolve the injunction and dismiss the case, assigning similar grounds and invoking action of the court.

The court on November 16th, District Judge Nevin sitting, (R. 39) heard the motion to dismiss for want of jurisdiction (R. 39) and granted the same (R. 39-40), upon the ground, (and this is the only possible ground since there was no evidence heard), that since it appeared on the face of the bill itself that both the Trustee and the Sheriff were residents of the State of Ohio, there was not the required diversity of citizenship and therefore, the District Court had no jurisdiction of this *plenary* action.

ARGUMENT.

It is the contention of the Trustee, and this contention was followed by the Court of Appeals, that diversity of citizenship is not essential in this action as the federal

jurisdiction is based upon other grounds. Our contention may be summarized as follows:

I The District Court had jurisdiction because of the express consent of the Sheriff, in accordance with the provisions of Section 46(b), Title 11, U. S. C.

II The District Court acquired jurisdiction because it had possession of the res through its Trustee in Bankruptcy.

(a) The bill alleges the Trustee was in possession.

(b) Under the law of Ohio, whatever it may be in other states, a sheriff acquires no possession of real estate under an execution.

III The Court of Common Pleas of *Hamilton* County, Ohio did not have jurisdiction over the real estate, of the bankrupt, located in *Butler* Co. Ohio.

I. The District Court Acquired Jurisdiction by Consent.

At first blush it would seem that a party can not by consent confer jurisdiction of the subject-matter of an action upon a court. That, however, is not the situation here because the jurisdiction of the subject-matter is conferred on the District Court by the provisions of Section 46 (b), Title 11, United States Code. The consent of the defendant does not confer the jurisdiction, but it simply operates to take the case out of the general provision of Section 46 (b) that suits must be brought in the jurisdiction which would have had the right to proceed had bankruptcy not been instituted.

The Trustee's contention is so clearly, forcibly and logically set forth by Judge Denison in his exhaustive opinion,

concurred in by Judges Knappen and Donahue of the Sixth Circuit, in the case of *Toledo Fence & Post Company* v. *Lyons*, 290 Fed. p. 637, that anything we might say in addition to the language of Judge Denison would be superfluous. We shall, therefore, content ourselves with briefly analyzing Judge Denison's reasoning.

Article 3, Section 2, of the Constitution provides:

> "Section 2. *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States*, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Counsels; to all Cases of admirality and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; *between Citizens of different States;* between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

We concede that there is no jurisdiction under the clause governing diversity of citizenship, but contend the jurisdiction is under the other clause italicised above, to wit, because it "arises under the laws of the United States."

Judge Denison points out at page 641, that an action brought by a Trustee in Bankruptcy would be one "arising under the laws of the United States" and sets forth the reasons and authority justifying this statement. Congress, therefore, had power to confide in the District Court jurisdiction over all suits brought by the Trustee should it choose to do so.

Coming to the action of Congress, we find that it has provided in the Bankruptcy Act, Section 46 (b), Title 11, U. S. C., as follows:

> "(b) Suits by the trustee shall be brought or prosecuted only in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, *unless by consent of the proposed defendant,* except suits for the recovery of property under section 96, subdivision b, of this title; section 107, subdivision e, of this title; and section 110, subdivision e, of this title."

From the foregoing, it is seen that Congress has not granted federal courts complete jurisdiction of suits brought by the Trustee, but has only permitted it in suits brought by the Trustee to recover property under Section 96 (b), Section 107 (e), Section 110 (e), of Title 11, U. S. C., and in cases where the *defendant consents.* Judge Denison, at page 645, second paragraph, has set forth the reason why Congress has limited the jurisdiction to cases where the defendant consents, as otherwise, defendants might be forced to go to distant district courts against their will. If the defendant consents this objection is removed.

In the first paragraph on page 645, Judge Denison completely answers the contention that the power of consent refers to a choice between two local state courts, because this is a field in which Congress would not intrude as the jurisdiction of the State Court would be controlled by State laws. The choice could not have been intended to refer to a choice between two districts in the federal courts, because such provision would have been wholly useless and ineffective since the defendant already, un-

der the federal practice, could waive any objection to the particular district in which he was sued. Judge Denison concludes, therefore, that the District Court acquires jurisdiction where the defendant consents, expressly or impliedly.

In the instant case, the Record, page 34, shows that the Sheriff expressly consented to the jurisdiction of the Federal Court and in fact requested instructions in regard to his rights.

In addition to the express consent, and even if there had not been the express consent, the Sheriff had theretofore waived objection to the jurisdiction by coming into court and asking the court's action on other matters. That is, he objected (R. 21, 37, 38) to the issuance of the injunction, because he alleged it was issued without bond; he set up as a defense the question of res adjudicata and asked the court to pass upon it; he further affirmatively invoked the jurisdiction of the court by asking the court to determine that the items included in the inventory were in fact personal property.

The rule is well settled that

> "If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy his appearance is general. There are cases where the defendant may make a quasi appearance for the purpose of objecting to the manner in which he is brought before the court, and in fact to show that he is not legally there at all, but if he ever appears to the merits he submits himself completely to the jurisdiction of the court and must abide the consequences. If he appears to the merits, no statement that he does not will avail him, and if he makes a defense which can only be sustained by an ex-

ercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not."

Massachusetts Bonding Co. v. *Bridge*, 37 F. (2d) at p. 701, (Fourth C. C. A.).

The Court of Appeals in this case, as may be seen from its opinion (R. 59 and 60), reaffirmed the principles enunciated by Judge Denison and held that the United States District Court had jurisdiction in this plenary action. We submit that the action of the court is so manifestly correct and in accordance with the statutes of the United States that the petition for writ of certiorari should not be granted.

II. The District Court Acquired Jurisdiction Because it had Possession of the Res.

It is a general principle, applicable to state or federal courts, that where property is in the custody or possession of the court, or its officers, that court has complete jurisdiction of the property and it is withdrawn from the jurisdiction of all other courts. Your Honors have well enunciated this rule in the case of *Murphy* v. *Hoffman Company*, 211 U. S., 562, 568; 53 L. Ed., 327, 330, where it is said:

"The act, however, preserves the jurisdiction, otherwise existing by statute, of the Courts of the United States, though it is limited to courts where the bankrupt himself could have prosecuted the action. *Bush* v. *Elliott*, 202 U. S., 477, 50 L. Ed., 1114, 26 Supt. Ct. Rep., 668. But, where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bank-

ruptcy, but applicable to all courts, Federal or State. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The *court*, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co.* v. *Adelbert College*, 208 U. S., 38, 54; 52 L. Ed. 379, 386, 28 Sup. Ct. Rep. 182. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver had no right to deliver it to him without the order of the court."

And again in *Isaacs* v. *Hobbs Company*, 282 U. S., 733; 75 L. Ed., 645, you have said:

"This is but an application of the well recognized rule that when a Court of competent jurisdiction takes possession of property through its officers, this withdraws property from the jurisdiction of all other courts who, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property (citing cases)."

To the same effect see:

Herbert v. *Crawford,* 228 U. S., 204; 57 L. Ed. 800; 33 S. Ct., 484;
Whitney v. *Wenman,* 198 U. S. 539; 49 L. Ed. 1157;
Taubel v. *Fox,* 264 U. S., 426, 433;
White v. *Schloerb,* 178 U. S., 542; 44 L. Ed., 1183; 20 S. Ct. 1007.

One of the latest cases on the subject is that of *Straton* v. *New,* 283 U. S., 318. In that case this court actually found that under the laws of West Virginia, State Commissioners were in effect receivers taking possession and control of the property, and, therefore, the property had been drawn into the custody of the State Court. The Court does, however, recognize the rule contended for, and points out, page 321, that the filing of a bankruptcy petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt, and that this jurisdiction is exclusive. It further points out that the estate is regarded as in custodia legis from the filing of the petition in bankruptcy. Your Honors further say on page 321, that the bankruptcy court:

> "May inquire into the validity of liens, marshal them, and control their enforcement and liquidation, (Citing cases).
>
> "Though a lien be not discharged by bankruptcy, its owner may not, without the bankruptcy court's permission, institute proceedings in a state court to enforce it, since his so doing might interfere with the orderly administration of the estate. Thus a mortgagee will be restrained from instituting or proceeding further in a foreclosure action, begun after the date of the petition in bankruptcy. *And a creditor holding a valid*

judgment more than four months old will be enjoined from enforcing its lien by suit brought after the date of the petition."

Applying these principles to the instant case we find that the Trustee in Bankruptcy was in possession, custody and control, for

(a) *The Bankruptcy Law Gave Him Possession.*

"The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. This jurisdiction is exclusive within the field defined by the law, and is so far in rem that the estate is regarded as in custodia legis from the filing of the petition."

Straton v. *New*, 283 U. S., 318, 321
Acme Harvester Co. v. *Beekman Co.*,
222 U. S. 300; 307.

"And on adjudication title to the bankrupt's property became vested in the Trustee, with actual or constructive possession, and placed in the custody of the bankruptcy court."

Acme Harvester Co. v. *Beekman Co.*,
222 U. S. 300; 306.
Mueller v. *Nugent*, 184 U. S. 1, 14.

(b.) *The Application States the Trustee had Possession.*

The rule is undisputed that the motion to dismiss admits as true the facts alleged in the bill and only the facts appearing on the face of the bill can be considered on the motion. If the bill states a cause of action it must not be dismissed.

Hill v. *Wallace*, 259 U. S. 44, 61.
Payne v. *Central* R. R. 255-U. S.-228; 232.

It is expressly alleged in the bill (R. 2) that the Trustee *"was and is in custody and control of"* the real estate herein. The court had no evidence to the contrary, and the statement in the bill must be taken to be true on motion to dismiss.

(c) *The Sheriff Had No Possession Under the Law of Ohio.*

Not only is there no evidence that the Sheriff had possession in fact, but the Sheriff cannot claim to be in possion, for, as heretofore stated, no evidence was heard and the case was heard simply upon the motion to dismiss the bill. Moreover, under the laws of the State of Ohio, the Sheriff cannot and did not obtain any possession of real estate. The judgment under which the Sheriff claimed to be acting was rendered in the Court of Common Pleas of *Hamilton* County, Ohio, but the Sheriff is the Sheriff of *Butler* County, Ohio, and the real estate is located in the City of Hamilton, *Butler* County, Ohio. In order to obtain a lien on real estate outside of Hamilton County, under the laws of Ohio, the judgment creditor must issue execution and this execution gives him a lien on the property by virtue of provisions of General Code 11656 of Ohio, which provides:

> "Such lands and tenements within the county where the judgment is entered shall be bound for its satisfaction from the day on which such judgment is rendered.
>
> All other lands, as well as goods and chattels of the debtor shall be bound from the time they are seized in execution."

The effect of the execution is simply to give a lien on such property. The Sheriff cannot and does not obtain any possession of real estate. The Supreme Court of

Ohio, in three different decisions, has expressly so held. We shall simply quote from the case of *Fowble* v. *Raybeg*, 4 Ohio, at 56:

> "There is a difference as to the effects of a levy upon goods and upon lands. Goods when levied upon are taken, or ought to be taken into the possession of the Sheriff, and so far become his property that he may maintain an action if they are taken from him. If of sufficient value to satisfy the debt, and if lost through his carelessness, he will be liable to the creditor, and may be made to pay the debt. *The land, however, remains in the possession of the defendant, and in that possession he cannot be disturbed until it is sold.*"

The foregoing decision has not been modified in any respect by any later decisions of the Supreme Court of Ohio to our knowledge. To the same effect see:

> *Reynolds* v. *Rogers*, 5 Ohio, 169 at 175;
> *Bisbee* v. *Hall*, 3 Ohio, 449 at 464;
> 17 O. Jur., Sec. 152, p. 815.

From the foregoing it is clear, first, that the Trustee in Bankruptcy had possession, custody and control over the real estate of The Long & Allstatter Company, Second, that the Sheriff did not and under the law of Ohio could not obtain possession, custody or control over such real estate.

Under the well known principles above recited, the Bankruptcy Court, through its officer, the Trustee in Bankruptcy, had jurisdiction over the property complained of and the decision of the Court of Appeals was correct.

III. Hamilton County Common Pleas Court did not Have Jurisdiction.

It is contended on page 19, *et seq.* of the argument and petition for writ of certiorari in this case, (as was contended in the court below), that the Court of Common Pleas of *Hamilton* County, Ohio, had exclusive jurisdiction over the property of The Long & Allstatter Company levied on by the Sheriff of Butler County, Ohio. This contention the Trustee unequivocally denies, for the following reasons:

(a) *Real Estate located Outside Jurisdiction of Hamilton County Court.*

The statutes of Ohio specifically provide, in General Code 11268:

> "Actions for the following causes must be brought in the county in which the subject of the action is situated, except as provided in the next two succeeding sections:
>
> "1. For the recovery of real property, or of an estate or interest therein;
>
> "2. For the partition of real property;
>
> "3. For the foreclosure of a mortgage, *or the enforcement of a lien or other incumbrance or charge on real property.*"

The only exceptions are referred to in 11269 which provides:

> "When the property is situated in more than one county, the action may be brought in either; but in actions to recover real property, this can be done only when the property is an entire tract."

and 11270 which provides:

> "An action to compel the specific performance of a contract for the sale of real estate may be brought either in the county in which the subject of the action is situated, or where the defendants, or any of them, reside. If the court has acquired jurisdiction over the persons of the parties, such a contract may be enforced in relation to land situated in another state."

It is apparent that neither of these latter two sections apply to the instant case and General Code 11268 applies here. The real estate of The Long & Allstatter Company is situated in *Butler* County, Ohio. Consequently the Court of Common Pleas of *Hamilton* County, Ohio has no jurisdiction or power to marshal and enforce liens or other encumbrances or charges against the real estate of The Long & Allstatter Company. On the other hand, the Bankruptcy Court does have this power and, therefore, it is perfectly apparent that the Common Pleas Court is not a court of concurrent or competent jurisdiction and there is, therefore, no question of a conflict between the District Court and the Common Pleas Court of Hamilton County, Ohio, as is contended by the appellants.

(b) *The Execution is Void.*

Furthermore, the Common Pleas Court did not have jurisdiction as the execution was void. Ohio General Code, 11664 provides:

> "The writ of execution against the property of a judgment debtor issuing from a court of record, shall command the officer to whom it is directed, that of the goods and chattels of the debtor he cause to be made the money specified

> in the writ, and *for want of goods and chattels,* he cause his lands and tenements to be sold for cash. * * *"

and Section 11666 provides:

> "The officer to whom a writ of execution is delivered shall proceed immediately to levy it upon the goods and chattels of the debtor. If no goods and chattels can be found, the officer shall indorse on the execution the words 'no goods' and forthwith levy it upon the lands and tenements of the debtor which are liable to satisfy the judgment."

As above pointed out, the judgment of the Long & Allstatter Company was rendered in Hamilton County, Ohio, and the real estate was located in Butler County, Ohio. The judgment of the Hamilton County Court did not become a lien until a valid levy was made thereon. No valid levy can be made in Ohio unless there is a return of "no goods" or unless upon a sale the chattels are insufficient to satisfy the judgment. The Trustee will show by the evidence that the Sheriff of Butler County, Ohio, on June 16, 1932, levied on the chattel property which he described in the return and thereupon, on the same date, proceeded to levy upon the real estate. For aught that appears in the return of the Sheriff the chattels will be ample to satisfy the judgment of Willis and the execution as to the real estate is void.

(c) *No Proceedings Were Pending to Enforce the lien.*

There were no proceedings pending in the Common Pleas Court of Hamilton County, for the sale of the real estate at the time of the filing of the petition in bank-

ruptcy. In Ohio, in order to institute a sale proceeding. the judgment creditor must execute a praecipe for writ of venditioni exponas, or order of sale.

Merwine on Judicial Conveyances of Real Estate, page 70 and 106, 17 Ohio Jurisprudence, Sec. 310.

As found by the Referee in the companion proceeding now on review in the Court of Appeals, all writs of venditioni exponas covering the real estate and issued prior to the bankruptcy proceeding, had either expired at the commencement of this bankruptcy proceeding or expired shortly thereafter, as the life of the proceeding under Ohio Statutes is limited to sixty (60) days.

(d) *Execution at Law of Mortgaged Real Estate Impractical under Ohio Statutes.*

The Trustee will show by the evidence, if allowed to be heard that there are three prior mortgages encumbering the real estate of the Long & Allstatter Company. Under these circumstances, execution and sale at law in Ohio is not a fair, adequate, practical or effective proceeding for enforcing the judgment and in order to enforce the judgment a creditor's bill is necessary to effect a proper sale.

Moore v. *Rittenhouse*, 15 Ohio St., 310;
17 Ohio Jur., Section 186.
17 Ohio Jurisprudence Sec. 263.

This is due to the fact, as pointed out, by the authorities cited, that as General Code of Ohio Sec. 11672 requires the appraisers of property to be sold on execution "to return * * * * an estimate of the real value of the property in money," and Section 11675 requires, "no tract of land shall be sold for less than two-thirds (2/3) of the value returned in the inquest."

The Trustee will show from the evidence, if permitted to proceed in this case, that the appraisers have valued the land and buildings at $186,115.04. The Trustee will further show by evidence that the real estate is encumbered by three mortgages, each executed and filed for record, prior to the rendition of Willis' judgment. The amounts of the three mortgages are $67,532.00; $20,000.00 and interest and $52,696.60 and interest, aggregating $140,-196.92 and interest. At sale on execution two-thirds of $186,115.04 is $124,076.64, which is the minimum price that the purchaser must pay. This purchaser would be acquiring the property subject to the three mortgages aggregating $140,196.92, so that the purchaser under the law of Ohio, if he acquired the property at the minimum bid at which it could be confirmed under the Ohio Statutes, would be paying $264,273.56 for real estate that is shown by the appraisement in the bankruptcy court to have a value of only $186,155.04. The instant case affords an excellent illustration of the reasons why the Ohio Courts have held that under the Ohio Statutes, it is not practical to sell real estate that is encumbered by a prior mortgage on execution, but an action to marshal liens, and sell the property free of liens must be first instituted.

Execution at law being inadequate, the rule of comity that entitles the Court first acquiring jurisdiction over the res to continue without interference from other Courts of coordinate jurisdiction pre-supposes that such Court has adequate jurisdiction in the particular proceeding to afford the relief sought.

For the foregoing reasons, we submit the Hamilton County Common Pleas Court did not have jurisdiction to effect a sale of the real estate of the Long & Allstatter Company and the only Court that did have such jurisdiction was the Bankruptcy Court.

IV. Conclusion.

In conclusion, our contentions may be summarized as follows:

I. The District Court acquired jurisdiction because of the express consent of the Sheriff under the provisions of Section 46 (b) Title 11, United States Code.

II. The District Court acquired jurisdiction because it had possession of the res through its Trustee in Bankruptcy.

(a) The bill alleges the Trustee was in possession.

(b) Under the law of Ohio, whatever it may be in other States, the Sheriff acquires no possession of real estate on execution.

III. The Court of Common Pleas of *Hamilton* County, Ohio, did not have jurisdiction over the real estate of the Long & Allstatter Company because:

(a) The property is located in Butler County, Ohio, and under General Code 11268, an action to enforce a lien cannot be brought in the Court of Common Pleas of Hamilton County, Ohio.

(b) The execution was void.

(c) There was no pending proceeding in the Common Pleas Court of Hamilton County, for the sale of the real estate.

(d) Execution at law is not a fair, adequate, practical or effective proceeding for enforcing the judgment under the law of Ohio.

For the foregoing reasons, we submit that the District Court acquired jurisdiction and the United States Circuit Court of Appeals for the Sixth Circuit, properly sent

the case to the District Court for the hearing of the contentions raised by the Trustee.

We respectfully urge that the petition for writ of certiorari should be denied.

Respectfully submitted,

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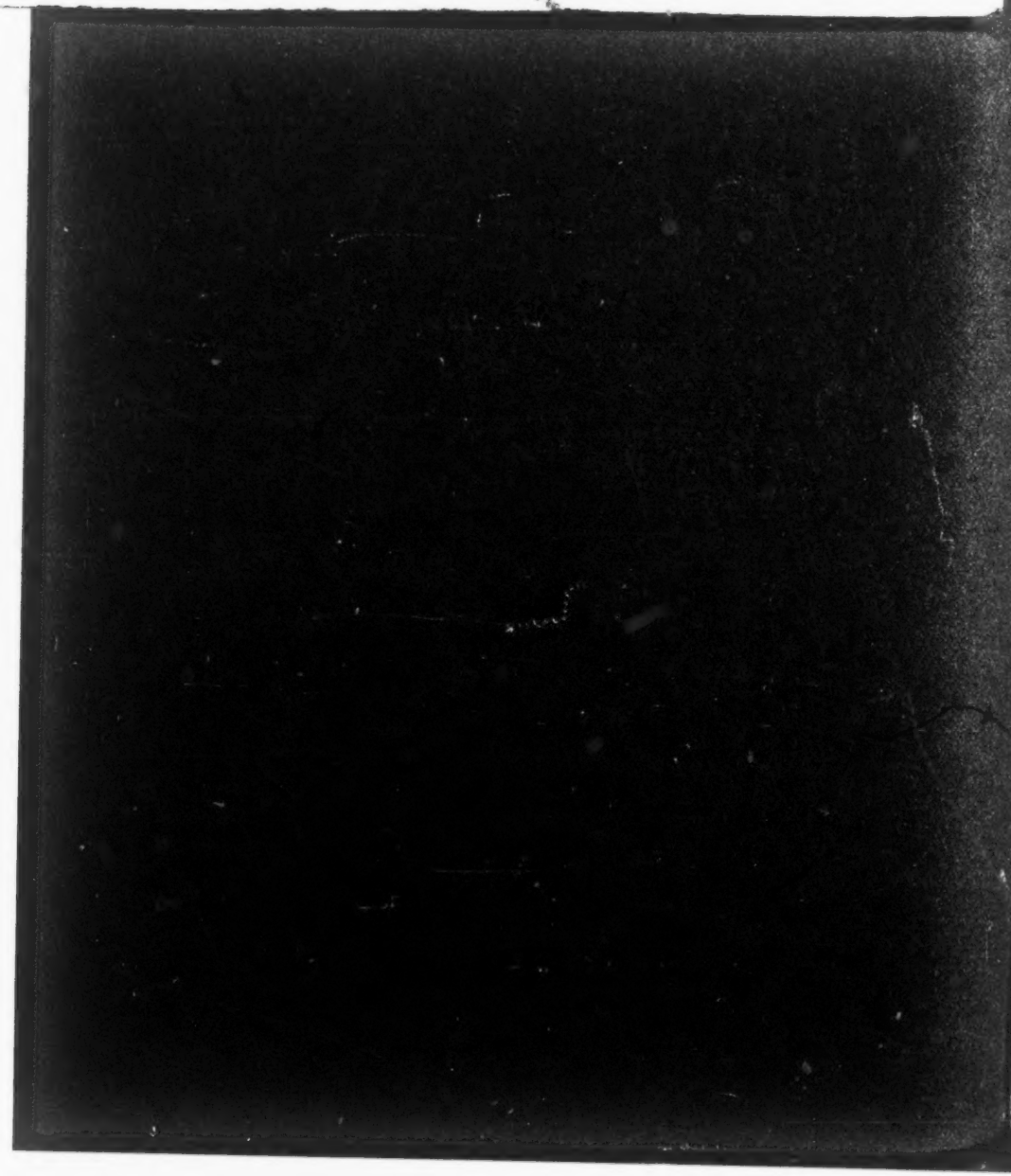
OPINION



SUPREME COURT OF THE UNITED STATES.

No. 215.—October Term, 1934.

John C. Schumacher, Sheriff of Butler County, Ohio, Petitioner, *vs.* Ralph K. Beeler, Trustee in Bankruptcy of the Long & Allstatter Company, Bankrupt.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 17, 1934.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

In granting the writ of certiorari, we limited our review to the question of the jurisdiction of the District Court under Section 23 (b) of the Bankruptcy Act. That provision, and its immediate context, Section 23 (a), are set forth in the margin.[1] 44 Stat. 664; 11 U. S. C., sec. 46 (a) (b).

This is a plenary suit brought by respondent, trustee in bankruptcy, in the District Court to enjoin the sale of certain property, alleged to be fixtures, attached to the manufacturing plant of the bankrupt, which petitioner, as sheriff, was threatening to sell under an execution issued more than four months prior to the bankruptcy proceeding upon a judgment recovered against the bankrupt in

[1]Section 23 (a) (b), as amended by the Act of May 27, 1926, c. 406, sec. 8, is as follows:

"Sec. 23 (a). The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"(b) Suits by the trustee shall be brought or prosecuted only in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 60, subdivision b; section 67, subdivision e; and section 70, subdivision e".

the Court of Common Pleas of Hamilton County, Ohio. The trustee's petition alleged that sale by the sheriff, pending a determination whether or not the property was a part of the realty, would cause irreparable damage to the bankrupt's estate. The trustee contends that the sheriff's levy upon the property in question was invalid under the law of Ohio, and that at the time of the filing of the petition in bankruptcy all writs of *venditioni exponas*, or orders for the sale of the real estate, had expired, and also that, as there were mortgages upon the property, the appropriate method of enforcing the judgment was by a creditor's bill.

The sheriff first appeared specially, asserting his claim by virtue of levy under execution, and sought dismissal of the suit upon the ground that the court was without jurisdiction. Shortly after, the sheriff withdrew his motion to dismiss, entered his general appearance, and made answer to the petition, expressly consenting that the District Court should hear and determine all matters to which the petition referred. The sheriff in this answer, after stating that he had levied upon personal property and real estate of the judgment debtor, said that a controversy had arisen whether or not certain items of "chattel property", set forth in the exhibit attached to the trustee's petition, were "in law fixtures and therefore a part of the real estate"; that it would be necessary to have that question determined so that he might be advised as to what part of the "chattel property", he had a right to sell under the execution; and that he did not know "as a matter of law whether the levy so made by him upon the real estate" was or was not a valid levy, and therefore he put the plaintiff "on proof thereof". The next day the sheriff asked leave to withdraw his answer. The disposition of that motion does not appear and the court below has assumed that it was not pressed. Later, the sheriff again moved to dismiss the cause for the want of jurisdiction, and the motion was granted.

This order was reversed by the Circuit Court of Appeals. That court concluded that the validity of the trustee's claim, and of that of the sheriff, depended upon disputed facts and issues of law; that the adverse claim of the sheriff was substantial and that its merits could be adjudged only in a plenary suit; that this proceeding should be treated as one of that nature and that there was consent to the jurisdiction of the District Court within the meaning of

Section 23 (b) of the Bankruptcy Act. As the case had not been heard upon its merits, and the record presented no findings of fact or conclusions of law, the Circuit Court of Appeals did not deal with any question except that of jurisdiction and directed that the cause be remanded to the District Court with instructions to hear and determine the controversy.

The trustee's petition, which the Circuit Court of Appeals treated as a bill of complaint, did not allege diversity of citizenship. Nor did it contain clear and sufficient averments showing that the complainant, as against the sheriff claiming under a judgment recovered and an execution issued more than four months before the bankruptcy, had possession of the property in question by virtue of which the District Court would have jurisdiction of the suit irrespective of the consent of the defendant.[2]

The case thus turns on the effect of the sheriff's consent under Section 23 (b). The sheriff contends that he had no authority to give the consent; but he was the defendant in the suit and his consent was actually given. We find no ground for concluding that the consent was invalid.

Conflicting views have been held of the meaning of the provision for consent in Section 23 (b). In one view, the provision relates merely to venue, that is, only to a consent to the "local jurisdiction". *Matthew* v. *Coppin*, 32 F. (2d) 100, 101. See, also, *McEldowney* v. *Card*, 193 Fed. 475, 479; *De Friece* v. *Bryant*, 232 Fed. 233, 236; *Operators' Piano Co.* v. *First Wisconsin Trust Co.*, 283 Fed. 904, 906; *Coyle* v. *Duncan Coal Co.*, 288 Fed. 897, 901; *Stiefel* v. *14th Street Realty Corporation*, 48 F. (2d) 1041, 1043. Compare *Lovell* v. *Newman*, 227 U. S. 412, 426. It has been said that if Section 23 (b) affects "substantive jurisdiction", as distinct from venue, Section 23 (a) appears to be redundant. *Stiefel* v. *14th Street Realty Corporation, supra.* The opposing view was set forth by the court below in *Toledo Fence & Post Co.* v. *Lyons*, 290 Fed. 637, 645, and that decision was followed in the instant case. See, also, *Boonville National Bank* v. *Blakey*, 107 Fed. 891, 893; *Seegmiller* v. *Day*, 249 Fed. 177, 178; *Stiefel* v. *14th Street*

[2]See Whitney *v.* Wenman, 198 U. S. 539, 552; Murphy *v.* John Hofman Co., 211 U. S. 562, 568-570; Hebert *v.* Crawford, 228 U. S. 204, 208; Taubel, etc., Company *v.* Fox, 264 U. S. 426, 432, 434; Isaacs *v.* Hobbs Tie & Timber Co., 282 U. S. 734, 737, 738; Straton *v.* New, 283 U. S. 318, 321, 326; Page *v.* Arkansas Gas Corporation, 286 U. S. 269, 271.

Realty Corporation, supra; Lowenstein v. *Reikes,* 60 F. (2d) 933, 935. It proceeds upon the ground that the Congress had power to permit suits by trustees in bankruptcy in the federal courts against adverse claimants, regardless of diversity of citizenship, and that by Section 23 (b) the Congress intended that the federal courts should have that jurisdiction in cases where the defendant gave consent, and, without that consent, in cases which fell within the stated exceptions.

We think that the latter view is the correct one. The provisions of the earlier bankruptcy acts and the purpose and significance of Section 23 of the Act of 1898, as originally enacted, were elaborately considered in *Bardes* v. *Hawarden Bank,* 178 U. S. 524. Section 8 of the Act of 1841 (5 Stat. 446) conferred on the Circuit Courts concurrent jurisdiction with the District Courts of all suits, at law or in equity, between assignees in bankruptcy and adverse claimants. This broad grant of jurisdiction was continued in Section 2 of the Act of 1867. 14 Stat. 518. *Lathrop* v. *Drake,* 91 U. S. 516. The Act of 1867 recognized and emphatically declared the distinction between proceedings in bankruptcy, properly so-called, and independent suits between assignees in bankruptcy and adverse claimants. Jurisdiction of such suits was conferred upon the District Courts and Circuit Courts of the United States by the express provision to that effect in section 2 of that act, and was not derived from the other provisions of sections 1 and 2, conferring jurisdiction of proceedings in bankruptcy. *Bardes* v. *Hawarden Bank, supra,* p. 533. The jurisdiction of such suits in law and equity was of the same character as that conferred upon the Circuit Courts by the eleventh section of the Judiciary Act of 1789 (*Morgan* v. *Thornhill,* 11 Wall. 65, 80) and the conferring of that jurisdiction upon the federal courts did not divest or impair the jurisdiction of the state courts over like cases. *Eyster* v. *Gaff,* 91 U. S. 521, 525; *Bardes* v. *Hawarden Bank, supra,* pp. 532, 533.

It was with this legislative background that the Congress undertook the framing of the Act of 1898. 30 Stat. 544. The distinction between proceedings in bankruptcy and suits between trustees in bankruptcy and adverse claimants was maintained. As appellate jurisdiction had been vested in the Circuit Courts of Appeals by the Act of 1891 (26 Stat. 826), the Act of 1898, in lieu of the "general superintendence and jurisdiction" given to the Circuit

Courts by the Act of 1867 "of all cases and questions" arising in bankruptcy, conferred upon the Circuit Courts of Appeals the jurisdiction "to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction". Section 24 b. But the Circuit Courts at that time were still courts of original jurisdiction and, by Section 23 of the Act of 1898, the Congress provided the extent to which the Circuit Courts should have jurisdiction of suits at law or in equity between trustees in bankruptcy and adverse claimants. Section 23, as originally enacted, was as follows (30 Stat. 552, 553):

"Sec. 23. *Jurisdiction of United States and State Courts.*—

"a The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

"c The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act".

Section 23a thus related exclusively to the Circuit Courts. Section 23b applied both to the Circuit Courts and the District Courts, as well as to the state courts. This appears, said the Court in *Bardes* v. *Hawarden Bank, supra,* (p. 536) "not only by the clear words of the title of the section, but also by the use, in this clause, of the general words, 'the courts', as contrasted with the specific words, 'the United States Circuit Courts', in the first and in the third clauses. The argument that if Section 23b affects "substantive jurisdiction", Section 23a is redundant, loses sight of the original distinction and application of the section and of its historical development.

By Section 289 of the Judicial Code of 1911 (36 Stat. 1167), the Circuit Courts were abolished; and by Section 291 of that Act it was provided that wherever, in any law not embraced within the Judicial Code, any power or duty is conferred or imposed upon the

Circuit Courts, that power and duty shall be deemed to be conferred and imposed upon the District Courts. This provision had the effect of amending Section 23a of the Bankruptcy Act so as to make it apply to the United States District Courts instead of the United States Circuit Courts. Formal amendment, to conform the language of the section to the fact, was made by the Act of May 27, 1926. 44 Stat. 664.

In enacting Section 23, it was clearly the intent of the Congress that the federal courts should not have the unrestricted jurisdiction of suits between trustees in bankruptcy and adverse claimants which these courts had exercised under the broad provisions of Section 2 of the Act of 1867. The purpose was to leave such controversies to be heard and determined for the most part in the state courts "to the greater economy and convenience of litigants and witnesses". But no reason appeared for a denial of jurisdiction to the federal court if the defendant, the adverse claimant, consented to be sued in that court. The Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction. See *Sherman* v. *Bingham,* 21 Fed. Cas. (No. 12,762), 1270, 1272. Exercising that power, the Congress prescribed in Section 23b the condition of consent on the part of the defendant sued by the trustee. Section 23b was thus in effect a grant of jurisdiction subject to that condition.

That this was the interpretation by this Court of Section 23b, in its original form, is shown not only by the statement of the result of the Court's analysis in the *Bardes* case, *supra,* (p. 538) but quite clearly by its formal disposition of the questions before it. The *Bardes* case was a bill in equity in the District Court by a trustee in bankruptcy to set aside a conveyance of property in fraud of creditors. The District Court dismissed the bill for want of jurisdiction and the case came here on direct appeal with a certificate by the District Judge submitting the questions which had arisen. This Court considered those questions and specifically answered the first and second questions as follows:

"1st. The provisions of the second clause of section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect

debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.

"2d. The District Court of the United States can, by the proposed defendants' consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy".

As there was no pretence of consent of the defendant in that case, the District Court was found to be without jurisdiction and its decree was accordingly affirmed. Compare *Mueller* v. *Nugent*, 184 U. S. 1, 16; *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526, 531; *Whitney* v. *Wenman*, 198 U. S. 539, 552; *Bush* v. *Elliott*, 202 U. S. 477, 479, 483; *Harris* v. *First National Bank*, 216 U. S. 382, 383; *Wood* v. *Wilbert*, 226 U. S. 384, 387.

After the decision in the *Bardes* case, and by Section 8 of the Act of February 5, 1903 (32 Stat. 797, 798), Section 23b was amended by adding, after the words "unless by consent of the proposed defendant", the following:

"except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e".

The excepted suits are those brought by the trustee in bankruptcy to recover property transferred by the bankrupt in effecting preferences made voidable by the Act, and suits to recover property conveyed by the bankrupt in fraud of creditors within four months prior to the filing of the petition in bankruptcy. The effect of the exception was to remove, as to these classes of cases, the requirement in Section 23b of the consent of the defendant as a condition of the exercise of jurisdiction. The Act of 1903 also amended sections sixty b, sixty-seven e, and seventy e, so as to provide that in suits to recover property under those sections "any court of bankruptcy", and "any state court" which would have had jurisdiction if bankruptcy had not intervened, "shall have concurrent jurisdiction", Act of February 5, 1903, secs. 13, 16; 32 Stat. 799, 800. The scope of the amendment of Section 23b by the Act of 1903, in the light of the amendment by the same Act of section seventy e—a question which was left undetermined in *Harris* v. *First National Bank, supra* (p. 385)—was passed upon in *Wood* v. *Wilbert, supra* (pp. 389, 390). The Court there decided that the amendment of section seventy e could not be regarded as

intended to create a conflict with the amendment of Section 23b, which did not include in the exception suits brought under section seventy e. The Court said: "In other words, the respective sections and their subdivisions confer jurisdiction on the designated courts so far as it is dependent upon the character of the suits, but when the condition expressed in subdivision b of § 23 exists the consent of the defendant determines the court, except when the suit is 'for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e'. These special exceptions exclude any other".

By the Act of June 25, 1910 (36 Stat. 840) Section 23b was further amended so as to include in the exception suits for the recovery of property under section seventy, subdivision e. See *Weidhorn* v. *Levy,* 253 U. S. 268, 272.

We think that the exceptions thus established by the amending acts show clearly that it was the intent of the Congress that Section 23b should operate as a grant of jurisdiction to the federal court of suits brought by a trustee in bankruptcy against adverse claimants, provided the defendant consented to be sued in that court, although the bankrupt could not have brought suit there if proceedings in bankruptcy had not been instituted, and that, in suits falling within the exceptions, the federal court should have jurisdiction without the defendant's consent. The question was not necessarily involved in the case of *Lovell* v. *Newman,* 227 U. S. 412, 426, and so far as the language of the opinion indicated a contrary view, it is not approved. Compare *MacDonald* v. *Plymouth Trust Co.,* 286 U. S. 263, 268; *Page* v. *Arkansas Gas Corporation,* 286 U. S. 269, 271, 272.

We conclude that the court had jurisdiction in the instant case, and the decree of the Circuit Court of Appeals setting aside the order of the District Court and directing that court to hear and determine the controversy upon its merits is affirmed.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.